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2705

No. 13039

United States
Court of Appeals
for the Ninth Circuit.

Serial 2704

BANK OF AMERICA NATIONAL TRUST AND
SAVINGS ASSOCIATION, a National Bank-
ing Association, and EUGENE J. O'RILEY,
as Trustee in Bankruptcy of the Estate of
UNITED PRODUCE COMPANY, a Corpo-
ration, Bankrupt,

Appellants,

vs.

MERCHANDISE NATIONAL BANK OF CHI-
CAGO, a National Banking Association,

Appellee.

SUPPLEMENTAL
Transcript of Record

Volume IV
(Pages 1157 to 1285)

Appeals from the United States District Court,
Northern District of California
Southern Division.

FILED

NOV 14 1951

No. 13039

United States
Court of Appeals
for the Ninth Circuit.

BANK OF AMERICA NATIONAL TRUST AND
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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

PAGE

Exhibits, Plaintiff's:

No. 2—Debit Slip November 19, 1948.....	1157
5—Extract from Deposition of Messenger	1159
6—Assignment	1168
7—Form Deposit Tag (Agreement).....	1169
9—Deposit Tag, Frank C. Lofendo...	1170-A
10—Letter to Bank of America, November 18, 1948.....	1171
11—Letter to F. E. Estribou.....	1174-A
12—Letter (Memo) United Produce Co..	1174-B
13—Memorandum dated November 15, 1948	1174-C
14—Stipulation	1175
15—Deposit Tag, Lofendo.....	1184
16—Rule for Undesirable Accounts, Bank of America.....	1185
18—Further Stipulation	1186
19—Receipt of Deposits.....	1187

	INDEX	PAGE
Exhibits, Plaintiff's—(Continued):		
No. 20—Payments for and Return of Outgoing Collections		1189
21—Page 2 Outgoing Cash Collections....		1192
22—Permanent Record Bank of America Re \$113,216.50		1193
23—Stipulation Concerning Testimony of Frank C. Lofendo.....		1194
27—Wire of Louie Rosenthal.....		1196
31—Deposition of Sam Gassman, for the Plaintiff.....		1196
32—Merchants National Bank Collection Form.....		1258
33—Tabulation of Lofendo (Uncollected Funds).....		1259
34—Examiner's Report.....		1260
Exhibits, Defendant's:		
E—Six Checks.....		1262
G—Collection Letter with Respect to the Six Checks Addressed by the Bank of Amer- ica to Merchandise National Bank.....		1268
J—Advice of Credit Four Checks.....		1269
O—Telegram dated October 20, 1948.....		1271
Q—Letter dated September 22, 1948.....		1272
NN—Stipulation Commercial Account Ledger.		1274

PLAINTIFF'S EXHIBIT NO. 2

GENERAL LEDGER DEBIT

CONTRA Suspense Liabilities
Administration

Accounting Dept. S. F. Hdqtrs. ~~Branch~~

November 19 48

\$ 113,216.50

COM. DEPT.

SAV. DEPT.

Total of Collection letter of East Bakersfield Branch

#419 to Merchandise National Bank, Chicago for which

they have credit advice and are sending their

debit. This debit requested by Mr. Estribou
per telephone call to Mr. Geo. Schilling, Legal

~~Department~~

CASE NO. 28721-R PLAINTIFF'S EXHIBIT No. 1 (found)
DEPENDENT'S

IN THE MATTER OF Overstanie v. Bank of Am.

DATE 10/5/49 WITNESS Tabax

APPROVED
SIGN HERE

Debit Merchandise National Bank
Chicago.

TELLER

MISC-1 10-46

Filed June 18, 1950.

PLAINTIFF'S EXHIBIT No. 5

Extract from Deposition of Frederick C.

Messenger—Pages 568-572

“No. 58840, dated 11/1/48, due 12/3/48, in the amount of \$57,870.32, Fifty-seven Thousand Eight Hundred Seventy Dollars and Thirty-two cents, 5%. Accounts receivable, and sundry collateral.

“No. 58850, dated 11/3/48, due 12/3/48, Thirty Days, in the amount of \$60,457.24, Sixty-Thousand Four Hundred Fifty-seven Dollars and Twenty-four Cents, at 5%. Accounts receivable, and sundry collateral.

“No. 58868, dated 11/3/48, due 12/3/48, Thirty Days, in the amount of \$70,628.40, Seventy-Thousand Six Hundred Twenty-eight Dollars and Forty Cents, at 5%. Accounts receivable, and sundry collateral.

“No. 58889, dated 11/4/48, due 12/3/48, Twenty-nine Days, in the amount of \$42,892.26, Forty-two Thousand Eight Hundred Twenty-nine Dollars and Twenty-six Cents, at 5%. Accounts receivable, and sundry collateral.

“No. 58912, dated 11/5/48, due 12/3/48, Twenty-eight Days, in the amount of \$108,581.58, One Hundred Eight Thousand Five Hundred Eighty-one Dollars and 58/100, at 5%. Secured by an assignment of accounts receivable dated 11/5/48, together with various subsequent assignments, and sundry collateral.

“No. 58913, dated 11/5/48, due 12/3/48, Twenty-eight days, in the amount of \$200,000.00, Two Hun-

Plaintiff's Exhibit No. 5—(Continued)

dred Thousand Dollars and no Cents, at 5%. Secured by an assignment of accounts receivable dated 11/5/48, together with various subsequent assignments, and sundry collateral.

“No. 58935, dated 11/6/1948, due 12/3/48, Twenty-seven days, in the amount of \$52,124.91, Fifty-Two Thousand One Hundred Twenty-Four Dollars and 91/100, at 5%. Secured by an assignment of accounts receivable dated November 5th, 1948, together with various subsequent assignments, and sundry collateral.

“No. 58957, dated Nov. 8, 1948, due 12/3/48, Twenty-five days, in the amount of \$84,787.69, Eighty-Four Thousand Seven Hundred Eighty Seven Dollars and 69/100, at 5%. Secured by an assignment of accounts receivable dated November 5, 1948, together with various subsequent assignments, and sundry collateral.

“No. 58986, dated 11/9/48, due 12/3/48, Twenty-four days, in the amount of \$73,314.39, Seventy Three Thousand Three Hundred Fourteen Dollars and Thirty-Nine Cents, at 5%. Secured by an assignment of accounts receivable dated 11/5/48 together with various subsequent assignments, and sundry collateral.

“No. 59010, dated 11/10/48, due 12/3/48, Twenty-three days, in the amount of \$79,675.31, Seventy-Nine Thousand Six Hundred Seventy-Five Dollars and Thirty-One Cents, at 5%. Secured by an assignment of accounts receivable dated 11/5/48, together

Plaintiff's Exhibit No. 5—(Continued)

with various subsequent assignments, and sundry collateral.

“No. 59033, dated 11/10/48, due 12/3/48, Twenty-three days, in the amount of \$15,636.42, Fifteen Thousand Six Hundred Thirty Six Dollars and Forty Two Cents, at 5%. Secured by an assignment of accounts receivable dated 11/5, together with various subsequent assignments, and sundry collateral.

“No. 59079, dated Nov. 12, 1948, due 12/3/48, Twenty-one days, in the amount of \$72,102.87, Seventy Two Thousand One Hundred Two Dollars and 87/100, at 5%. Secured by an assignment of accounts receivable dated November 5, 1948, together with various subsequent assignments and sundry collateral.

“No. 59080, dated 11/12/48, due 12/3/48, Twenty-one days, in the amount of \$56,853.89, Fifty-Six Thousand Eight Hundred Fifty Three Dollars and Eighty Nine Cents, at 5%. Secured by an assignment of accounts receivable dated 11/5, together with various subsequent assignments, and sundry collateral.

“No. 59098, dated 11/13/48, due 12/3/48, Twenty days, in the amount of \$88,864.36, Eighty-eight Thousand Eight Hundred Sixty-Four Dollars and Thirty-six Cents, at 5%. Secured by an assignment of accounts receivable dated 11/5/48 together with various subsequent assignments, and sundry collateral.

“No. 59099, dated 11/13/48, due 12/3/48, Twenty days, in the amount of \$72,190.57, Seventy-two

Plaintiff's Exhibit No. 5—(Continued)

Thousand One Hundred Ninety Dollars and Fifty-seven Cents, at 5%. Secured by an assignment of accounts receivable dated 11/5/48 together with various subsequent assignments, and sundry collateral.

“No. 59115, dated 11/15/48, due 12/3/48, Eighteen days, in the amount of \$58,293.55, Fifty Eight Thousand Two Hundred Ninety Three Dollars and Fifty Five Cents, at 5%. Secured by an assignment of accounts receivable dated 11/5/48, together with various subsequent assignments, and sundry collateral.

“No. 59153, dated 11/16/48, due 12/3/48, Seventeen days, in the amount of \$92,835.94, Ninety Two Thousand Eight Hundred Thirty Five Dollars and Ninety Four Cents, at 5%. Secured by an assignment of accounts receivable dated 11/5/48, together with various subsequent assignments, and sundry collateral.”

Due 12/3/48, No. 58840.

Chicago, Ill., 11/1/48

\$57870.32

Thirty Two Days After Date, for Value Received, the undersigned, jointly and severally, promise(s) to pay to the order of the Merchandise National Bank of Chicago, at its office in Chicago, Illinois, Fifty-Seven Thousand Eight Hundred Seventy Dollars and Thirty-Two Cents, with interest thereon

Plaintiff's Exhibit No. 5—(Continued)

at the rate of 5% per cent per annum from date to maturity, and seven per cent thereafter until paid.

To secure the payment of this note, and of any and all other indebtedness, obligation or liability of the undersigned to the holder hereof due or to become due, whether direct or indirect, absolute or contingent, joint or several, and whether heretofore or hereafter contracted or existing and wheresoever and howsoever acquired by said holder or created, arising or evidenced, the undersigned jointly and severally hereby deposit(s), transfer(s), pledge(s) and deliver(s) to Merchandise National Bank of Chicago the following property, to wit: Accounts Receivable, and Sundry Collateral together with any and all other property of the undersigned, or any of them, of every kind and description now or hereafter and howsoever in the possession or control of, or in transit to or from said holder hereof.

The undersigned hereby, jointly and severally, agree(s) that upon breach of any of the promises herein contained, or upon failure to pay any of said other indebtednesses, liabilities or obligations when due, or in the event that said collateral shall depreciate in value in the opinion of the holder hereof so that it becomes inadequate security, or if said holder shall feel unsafe or insecure for any reason whatsoever, said holder may thereupon, or at any time or times thereafter, sell, and the said holder is hereby given full and irrevocable power and authority to sell, assign and deliver

Plaintiff's Exhibit No. 5—(Continued)

the said property or any part thereof, and any substitute therefor and any additions thereto, at any Brokers' Board, or at public or private sale, without notice, advertisement, or demand of any kind to anyone and without prejudice to any other remedies afforded by this instrument, and may apply the net proceeds, after deducting all costs and expenses for collection, sale and delivery, to the payment of this note and/or of any or all of said indebtednesses, liabilities or obligations whether then due or not due, returning the residue to the undersigned or any of them on demand; the undersigned hereby agreeing to remain jointly and severally liable for, and to pay forthwith any deficiency remaining unpaid after such application. Said holder hereof may purchase any of said property at any such Brokers' Board or public sale. At any time, whether in case of decline in the market value of said property or any part thereof, or otherwise, the holder hereof may demand the pledge and delivery of additional property of quality and amount satisfactory to said holder; and the failure on the part of any of the undersigned to deliver such additional property on demand, shall cause this note and all other indebtednesses, liabilities and obligations of the undersigned to the holder to become due and payable on demand. At any time, whether in case of the insolvency of the undersigned or otherwise, and without notice or demand of any kind, any indebtedness owing by the said holder hereof to any or all of the undersigned or to any endorser or guarantor and/or any property held for them, or

Plaintiff's Exhibit No. 5—(Continued)

any of them, of whatsoever kind or description, may be by said holder appropriated and applied hereon, or on any other indebtedness, liability or obligation owing the holder, direct or indirect, absolute or contingent, as well before as after the maturity hereof or thereof. The said holder is hereby expressly empowered at any time or times hereafter and without notice to anyone, to receive, collect, compromise, renew, extend, substitute, exchange, surrender or release to any party hereto, or otherwise deal with, or to refrain from exercising any of the aforesaid powers or any of a pledgee's duties in respect to, said property or any part thereof, and in respect to any substitute therefore and any additions, dividends, distributions, coupons, interest, rights and accruals thereto, without liability of any kind on the part of the said holder and without in any manner releasing the obligations of any of the undersigned to the said holder. The undersigned, whether principal, surety, guarantor or party hereto in any capacity, jointly and severally, hereby agree(s) and assent(s) to any renewal or extension of time of payment or performance of any of the conditions of this note and to the addition of one or more signatures above or below my or our signature; agree(s) that it shall not be necessary for the holder to resort to legal remedies against any of the undersigned before proceeding against any other of the undersigned; and agree(s) that no release of one or more makers whether by operation of law or by

Plaintiff's Exhibit No. 5—(Continued)

any act of the said Bank or holder of this note shall release any other maker; waive(s) notice of any election, acceptance, demand, protest, notice of protest and notice of default, presentment for payment and diligence in collection; and agree(s) that if this note is placed in the hands of an attorney for collection in the event of default in any of the terms and conditions hereof, to pay, in addition to principal and interest, according to the tenor of this note, fifteen per cent (15%) of said principal and interest as and for attorneys' fees and collection expense. And to further secure the payment of this obligation, the undersigned, whether principal, surety, guarantor or party hereto in any capacity, hereby authorize, irrevocably, any attorney of any Court in the United States to appear for the undersigned in such Court, in term time or vacation, at any time hereafter, and confess a judgment against any one or more or all of the undersigned, without process, in favor of the holder of this Note for such amount as may appear to be unpaid thereon, together with costs and reasonable attorneys' fees and to waive and release all errors which may intervene in any such proceedings, and to consent to immediate execution upon such judgment, hereby waiving personal service of such execution and hereby ratifying and confirming all that said attorney may do by virtue hereof. If there are two or more signers to this

Plaintiff's Exhibit No. 5—(Continued)
note and power of attorney, the foregoing power
is joint and several.

Address: 1421 So. Aberdeen.

UNITED PRODUCE
COMPANY,

/s/ [Indistinguishable.]
Secretary Treasurer.

[Longhand in top margin]: 5/2.

[Longhand in foot margin]: 12/15.

[Endorsed]: Filed July 14, 1949. Referee.

[Endorsed]: Filed June 16, 1950.

ASSIGNMENT

collateral security to assure the payment of a loan or loans about to be made to or renewed for assigned by the MERCHANDISE NATIONAL BANK OF CHICAGO, (hereinafter designated "BANK") and also of any present or future indebtedness, liability or obligation of the undersigned to the BANK, whenever and howsoever and hereby created, the undersigned, FOR VALUE RECEIVED, hereby assigns, transfers, sets over and pledges unto the BANK all the right, title and interest of the undersigned not only in and to the sums specified on the signed schedule hereto attached, bearing even date herewith, marked Exhibit A (and hereby made a part hereof) due and to become due the undersigned from the persons, firms and corporations named in said schedule but, as well, in and to any returned goods, property, securities, guarantees, indemnities, rights or liens (and the avails and benefits therefrom) in connection therewith now held by the undersigned or to which the undersigned is now or may hereafter become entitled or may hereafter receive or acquire.

The undersigned expressly warrants:

- (1) That the names and the sums in said schedule specified exactly describe existing, unconditional, valid and enforceable indebtednesses by solvent debtors, each of which such indebtednesses appears of record on the books of account of the undersigned, is due and payable to the undersigned on the due date thereof in said schedule specified and arises from property actually sold and delivered by, or services fully performed by, the undersigned.
- (2) That there are no extensions or indulgences nor any disputes as to, and no defenses to, nor set-off nor counter-claims against, the payment of such indebtednesses on their respective due dates, nor any prohibitions against, or restrictions as to, this assignment thereof and that no such extension or indulgence thereof nor any settlement, adjustment or compromise of any thereof for less than the full face amount thereof will be given or made without first obtaining the written consent of the BANK.
- (3) That no other assignment of said sums, or any part thereof, has been or will be made and that no right, claim or lien exists with respect thereto superior to the rights, title and interest transferred to the BANK hereunder.
- (4) That, prior to the delivery hereof, all entries on books of account recording the indebtedness assigned hereunder, were stamped with the notation: "Property of MERCHANDISE NATIONAL BANK OF CHICAGO by assignment."

The undersigned further agrees:

- (5) To endorse for collection by the BANK, forthwith, upon their receipt, all checks, drafts, and other instruments received by the undersigned whether in full or partial payment of any indebtedness, right, interest, or anything else assigned hereunder; to immediately deliver the same, in the form in which received, so endorsed, and stay all cash so received, to the BANK, all such receipts to be and remain the property of, and be held by the undersigned merely as the agent of, the BANK until so delivered; and to refrain from exercising any dominion over the same whatsoever and from commingling the same with any other funds or property of the undersigned.
- (6) To pay the BANK the reasonable costs of audits, investigations and collections, including attorney's fees, court costs, travel and communication expenses and all other expenses involved in maintaining and collecting the indebtedness assigned hereunder and to permit deductions therefor by the BANK from any sum received by the BANK on any item assigned hereunder.
- (7) That, when duly executed, the mere delivery of this instrument and the schedule aforesaid, shall operate to perfect the transfer and pledge to the BANK intended thereby without either the BANK or the undersigned giving notice of this assignment to the debtors whose indebtednesses are assigned hereunder, notwithstanding any rule of law or in equity, whereover the jurisdiction, requiring that notice be so given in order to perfect such transfer and pledge.
- (8) Forthwith, whenever requested by the BANK so to do: to send to the debtors whose indebtednesses are assigned hereunder, a notice by United States registered mail in such form as the BANK shall require, advising that all of the right, title and interest of the undersigned therein has been assigned to the BANK and that all payments thereafter should be made direct to the BANK; to furnish the BANK copies of invoices identical with those actually rendered said debtors and, as well, evidence competent to prove full performance or actual delivery to the debtor involved; to give the duly accredited representatives of the BANK free access to the premises and all records of the undersigned for the purpose of verifying the said indebtednesses and/or ascertaining the financial condition of the undersigned and for the purpose of receiving, receipting for and opening all mail addressed to the undersigned, all of which the BANK by its said representatives is hereby expressly authorized so to do; and, further, to deliver to the BANK such instruments of further assurance as it may require to carry out the intent hereof.
- (9) That all rights, powers, privileges and remedies of the BANK shall be cumulative and no failure or delay to enforce or exercise any of the same shall operate as a waiver or release thereof.

The undersigned hereby expressly authorizes and empowers the BANK, in its discretion and without notice to or other or further consent by the undersigned:

- (10) To ask, demand, collect, receive, compound, compromise, adjust, grant extensions of time of payment of, and give acquittances for, any and all sums assigned hereunder or any part thereof, now or hereafter due, and to enforce the payment thereof by suit, or otherwise, either in its own name or the name of the undersigned. Notice of presentation for payment, of non-payment and dishonor and diligence in collection and all formalities legally required to charge it with liability hereunder are hereby expressly waived by the undersigned.
- (11) Even though the then indebtedness, liability or obligation of the undersigned to the BANK be otherwise not due, to charge the undersigned's account with the BANK with all sums not paid by debtors on the due dates in said schedule specified and with the full amount of any assigned indebtedness as to which any goods have been returned or any extension or indulgence given by the undersigned or any set-off or counter-claim asserted or any dispute or defense arises.
- (12) To credit all moneys received by it hereunder against any and all indebtedness, liability or obligation of the undersigned to the BANK, direct or indirect, absolute or contingent, or to hold all or any part of such moneys as non-interest bearing collateral securing any such indebtedness, liability, or obligation.

The undersigned hereby irrevocably constitutes and appoints the Cashier or any Assistant Cashier of the BANK his or its lawful attorney with full power to endorse the name of the undersigned upon any notes, checks, or any other evidence of payment of anything assigned hereunder and to do and perform, and cause to be done and performed, any act or thing necessary or appropriate to carry out the purposes and intent hereof.

This instrument, delivered at Chicago, Illinois, shall be deemed executed and to be performed in Illinois and, even if executed or to be performed elsewhere, shall nevertheless be construed and given effect according to those laws of the State of Illinois which are applicable to contracts that are not only executed in, but are also delivered and performed in, Illinois and all its terms and provisions shall be binding upon the undersigned, his or its legal representatives, successors and assigns and shall inure to the benefit of said BANK, its successors and assigns.

IN WITNESS WHEREOF the undersigned has duly executed this instrument or has caused this instrument to be duly executed by its proper officers, all duly authorized in the premises, this 5th day of November 1946.

(CORPORATE SEAL)

ATTEST:

UNITED PRODUCE CO

(SEAL)

By

PLAINTIFF'S EXHIBIT No. 7

Agreement

In receiving and handling items for deposit or collection (including items received in payment of collections) this Bank acts only as depositor's collecting agent and assumes no responsibility beyond the exercise of due care. All items are credited or cashed subject to final payment in cash or solvent credits. This Bank will not be liable for default or negligence of its correspondents, nor for losses in transit, and no correspondent shall be liable except for its own negligence.

It is optional, but not obligatory, to request certification in any case. This Bank or its correspondents may, as depositor's agent, send items, directly or indirectly, to any bank or to any drawee, acceptor or payor, and accept draft, check or credit as conditional payment in lieu of cash. It may charge back any item at any time before final payment, whether returned or not, also any item drawn on this Bank not good at close of business on day deposited. It may decline to honor or pay checks drawn against conditional credits.

This Bank shall have a lien on all items handled by it and on the proceeds thereof for its charges, expenses (including court costs and attorneys' fees) and any advances made by it in connection therewith.

It may transmit any item for collection to any Federal Reserve Bank and such item shall be subject to the rules and regulations of such Federal

Reserve Bank or of the Federal Reserve Board now in force or hereafter promulgated.

Items payable in the City of Chicago, or in any suburb thereof, may be collected directly or indirectly through the Chicago Clearing House Association (in which event they may be carried over for presentation on the following business day) and will be subject to its rules and regulations now in force or hereafter adopted, or they may be collected in any manner hereinbefore provided or contemplated.

This Bank endeavors to forward items payable outside of Chicago on day of receipt, but it is understood that they need not be forwarded until the following business day.

[Endorsed]: Filed June 16, 1950.

PLAINTIFF'S EXHIBIT NO. 9

COMMERCIAL

Bank of America
NATIONAL TRUST AND SAVINGS ASSOCIATION

DEPOSITED FOR ACCOUNT OF

FRANK C LOFENDO
BAKERSFIELD INN

DATE **NOV 70** ADDRESS **1111 11 48**

CURRENCY (DETAIL ON REVERSE)	COIN	CHECKS (PROPERLY ENDORSED)	DOLLARS						CENTS	
		1	18	4	2	6			00	
		2	15	6	4	5			00	
		3	17	9	7	6			00	
		4	24	6	9	2			00	
		5	20	0	3	1			00	
		6	18	4	2	6			00	
		7	113						216	50
		8								
		9								
		10								

LIST BY BANK NUMBER SEPARATELY, BELOW, EACH CHECK COMING THIS DEPOSIT.

U. F. Co

R-3 1-46

[Endorsed]: Filed June 19, 1950.

PLAINTIFF'S EXHIBIT No. 10

[13039]

November 18, 1948

Bank of America N. T. & S. A.,
300 Montgomery Street,
San Francisco 20, California.

Gentlemen:

This will confirm our conversation of today in which you were authorized to return the following items without protest:

\$38,682.27	\$31,755.56
31,258.66	38,044.91
44,070.85	28,385.05
39,333.51	25,819.49

all of these items having been included in our cash letter of November 12, 1948, totaling \$169,152.10 and our cash letter of November 13, 1948, totaling \$165,818.75. We understand that these items were received by you November 15, 1948, and were sent by you to your Bakersfield Branch (#415) in your cash letter dated November 15, 1948, totaling \$814,-163.86.

We also confirm instructions to return without protest items in amount of \$27,842.65 and \$28,325.50 which were received by you in our cash letter of November 15, 1948, totaling \$114,310.33, which items, we understand, were sent by you to your Bakersfield Branch (#415) in your cash letter dated November 17, 1948.

You are also authorized to return without protest or presentation the following three items:

\$29,652.91

35,807.43

25,316.35

received by you on November 18, 1948, in our cash letter of November 16, 1948, totaling \$151,093.86.

A collection letter of the East Bakersfield Branch (#419) of the Bank of America N. T. & S. A., No. C-419-4768, containing the following checks of the United Produce Company endorsed: "Frank C. Lofendo":

\$18,426.00

\$17,976.00

20,031.00

15,665.00

22,692.50

18,426.00

totaling \$113,216.50 was received by us on November 15, 1948, and, in error, an advice of credit for the items was mailed on November 16, 1948. The items numerated above totaling \$113,216.50 are not being accepted by us and will be returned to the East Bakersfield Branch (#419) of the Bank of America N. T. & S. A., and this letter will serve as your authority to return our credit advice, which was sent to you in error and which has not yet been received by your East Bakersfield Branch, without action.

Thanking you for your cooperation in this matter,
we are

Very truly yours,

MERCHANDISE NATIONAL
BANK, CHICAGO, ILLINOIS,

By /s/ R. LeROY,
Vice President.

[Endorsed]: Filed June 19, 1950.

PLAINTIFF'S EXHIBIT NO. 11

Bank of America
NATIONAL EXCHANGE ASSOCIATION

November 18

1949

Banks and Bankers Department
From San Francisco Headquarters
BRANCH OR DEPARTMENT AND HEADQUARTERS

Subject

Mr. F. E. Estribou, Manager
East Bakersfield Branch (419)
Bakersfield, California

Dear Mr. Estribou:

This is to confirm our various telephone conversations of today. I am enclosing a signed copy of a letter given to us today by Mr. A. R. LeRoy, Vice President of the Merchants National Bank, Chicago, Illinois. The original we are maintaining for our files. I believe you will find the letter to be self-explanatory.

During your telephone conversation this afternoon with Kenneth M. Johnson, Assistant Counsel of our Legal Department, you were informed of our bank's position in this case, namely, we must recognize their instructions.

Mr. LeRoy will have called on you tomorrow before you receive this letter. From what he told me today, it does not look too encouraging for them and any assistance you are able to give him will certainly be appreciated.

Every indication points to your office coming out O.K., and from what you said, my hat's off to you. For your information, I just finished talking to our Fresno Office and everything appears to be in the clear there also.

Regards.

Sincerely,

Roland T. Duncan
Roland T. Duncan
Assistant Vice President

Enclosure

CASE No. 28724-R PLAINTIFF'S EXHIBIT No. 29 David
IN THE MATTER OF Merchants National Bank v. Bank of America
DATE 11/19/49 WITNESS Peterson

Plf's 29 is

[Endorsed]: Filed June 19, 1950.



Piff's 3-10-49
CREDIT MEMORANDUM

East Bakersfield

Oct. 22, 1948

SUBJECT: UNITED PRODUCE CO. AND FRANK C. LOFENDO

It has been brought to my attention of unusual operations between the two subject parties. Frank Lofendo, who has an account at this Branch, has been making deposits consisting of checks drawn by United Produce Company on Merchandise National Bank, Chicago, Illinois. The amounts have been averaging medium five figures and seem to be gradually increasing. Upon checking the cancelled checks of Mr. Lofendo, we find that the majority of checks in medium five figures, are made payable to the United Produce Company.

A few days ago, I wired Merchandise National Bank asking for the financial responsibility and the top limit for acceptance of checks on the United Produce Company. Their response was that they loaned them legal limit on secured basis. Net worth of the Company was over \$80,000.00 and that they could not set a limit on acceptance of checks and suggested that we contact our Fresno Main Office, who have complete information on the Company.

Mr. Nelson of Fresno Main Office has been contacted and the information that he gave us was no more than what was contained in our wire response.

This has been taken up with Mr. Estribou, Manager, and he has given instructions that we do not accept these checks for immediate credit until such time as Mr. Lofendo can be contacted and his method of operation discussed.

At the present time Mr. Lofendo is in Chicago and is expected to return in about two weeks.

I. N. Tarr
I. N. Tarr,
Assistant Cashier-Chief Clerk

INT: gld

X
FEE

PBG

JVC

KJC

CASE No. 28721-R

PLAINTIFF'S

DEPENDENT'S

EXHIBIT No. 3-10-49

IN THE MATTER OF Merchandise National Bank of America

DATE 9/29/49

WITNESS

Edwards

[Endorsed]: Filed June 19, 1950.

Page 7 (id)

CREDIT MEMORANDUM 28721-R

PLAINTIFF'S
DEPENDENTS

EXHIBIT NO. 7 *Amended*

East Bakersfield

IN THE MATTER OF

DATE 9/29/49

WITNESS *Extraordinary*

Nov. 15, 1948

SUBJECT: FRANK C. LOFENDO

This is in further reference to the activities and operations of the account of Frank C. Lofendo. Shortly after the last memorandum, Mr. Lofendo flew from Chicago with the President of United Produce Company. The matter of his deposits and checks drawn against his account was discussed with Joseph V. Cosgrove, Assistant Manager.

It was my understanding, as a result of this conversation, that it had been agreed that he, Mr. Lofendo, would not draw against his deposits until such time as the items would be cleared. Also, he would endeavor to increase the balance of his account. The account at present appears to be used as a clearance account between United Produce Company and himself. Mr. Cosgrove was apparently satisfied with this arrangement.

This matter was again re-discussed at our Officer's meeting on Wednesday, November 10th and at that time, Mr. Lofendo insisted that all items deposited should be cleared before credit is allowed.

Upon complying with this request, it has been necessary to return many checks for the reason "drawn against uncollected funds". As a result, we have had many long distance calls from Chicago, Philadelphia and San Francisco concerning these.

J. H. Tamm
Assistant Cashier-Office Clerk
LJP

TNT: cld

FEE

PAC

WCC

LJP

Enclosed: Filed June 19, 1950.

X

PLAINTIFF'S EXHIBIT No. 14

STIPULATION

From time to time after September 6, 1948, checks drawn by United Produce Co. to the order of F. C. Lofendo came in the mail to the East Bakersfield Branch of defendant in envelopes bearing the imprinted return address of the Bakersfield Inn, Bakersfield, California. (No stipulation is made as to what transpired prior to September 6, 1948.) Accompanying the checks in the enclosing envelope were slips or tags usually called deposit tags, in the form marked as Exhibit 19 on the Estribou deposition, which is hereby placed in evidence as Plaintiff's Exhibit 9. These tags had the name of Frank C. Lofendo on them, together with a list of the accompanying checks with a notation by whom they were drawn, most of them by United Produce Co.

On some occasions when these checks arrived at defendant's Branch immediate credit was entered in the amount of the checks in the Lofendo account. On other occasions no credit was entered in the Lofendo account but the checks upon receipt by defendant Bank were rubber stamped with a notation reading "East Bakersfield Branch, Bank of America, N. T. & S. A. Col... [(with a number inserted in the blank)] Bakersfield, Cal." The "Col." stood for "Collection" and in the blank was inserted the same number as was placed on the collection letter by which the checks were then forwarded for collection. With respect to such

Plaintiff's Exhibit No. 14—(Continued)

checks they were then sent forward to Chicago to plaintiff Bank on which they were drawn, under cover of a collection letter.

On November 13, 1948, six such checks, aggregating \$113,216.50, arrived at defendant's said Branch. These are the checks already marked in evidence as Defendant's Exhibit E. There was then placed upon the checks at defendant's Branch the collection stamp referred to above. No credit for these checks or any part was entered in the account of Lofendo on that day, or thereafter except as hereafter stated. On that day, November 13, 1948, defendant's Branch sent the six checks by a collection letter to plaintiff Bank in Chicago. Def. Exhibit G already placed in evidence is the original of that collection letter.

On November 15, 1948, an employee of plaintiff Bank mailed to defendant an "Advice of Credit," of which defendant's Exhibit A, already in evidence, is the original.

On November 17, 1948, in the afternoon, a telephone conversation occurred between Mr. Messenger, plaintiff's Comptroller, and Mr. Estribou, manager of defendant's East Bakersfield Branch.

On November 18, 1948, Mr. LeRoy, Vice-President of plaintiff Bank, was in the office of defendant at its headquarters in San Francisco and there wrote a letter to defendant Bank, dictating it to a stenographer in defendant's employ, and delivered it to defendant through defendant's Mr. Roland T. Duncan. Mr. Duncan at that time was

Plaintiff's Exhibit No. 14—(Continued)

an assistant vice president of defendant in the Bank and Banker's Division of the Administration Department at its headquarters office in San Francisco.

The letter, marked on the deposition of Mr. Estribou as Exhibit 30, is the letter just referred to and is hereby placed in evidence as plaintiff's Exhibit 10.

On the same day, November 18, after receipt of that letter, Mr. Duncan wrote a letter to Mr. Estribou, signed and mailed it, and enclosed with it a copy of the letter just referred to, plaintiff's Exhibit 10. Exhibit 29 as marked on the deposition of Mr. Estribou is that letter, and is hereby placed in evidence as plaintiff's Exhibit 11. That letter was received by Mr. Estribou at the East Bakersfield Branch at about 2:00 o'clock p.m. on November 19.

The Advice of Credit referred to above arrived through the mail at the San Francisco Head Office of defendant at about 9:00 o'clock in the morning of November 18, in the auditing department but upon its arrival there, that department had no function to perform in relation to it other than to treat it as a misrouted item and forward it to the East Bakersfield Branch where the collection had originated. This was done as a matter of routine by the clerical staff. The advice of Credit was placed in the mail and arrived at the East Bakersfield Branch on November 19 at about 8:15 a.m.

On November 15, 1948, there arrived at defend-

Plaintiff's Exhibit No. 14—(Continued)

ant's East Bakersfield Branch in the same manner as already stated above a group of checks payable to the order of "Frank C. Lofendo" totalling \$97,207. Defendant's Branch entered immediate credit for this amount in the Lofendo account on that day and sent the checks forward by cash letter to its correspondent in Chicago, Continental Illinois National Bank and Trust Company. At the beginning of that day and before the entry of this credit the Lofendo account had in it a credit balance of \$13,061.17. On November 16th, before any other items were entered to the credit of the Lofendo account, defendant's Branch honored three checks which arrived that morning over the signature of Frank C. Lofendo (payable to United Produce Co.) in the amount of \$37,645, \$34,678 and \$37,245, and charged them to the account as of November 15th.

On November 18, 1948, at 4:45 p.m. the East Bakersfield Branch of defendant received a telegram from Continental Illinois National Bank advising it that the checks for \$97,207 had been rejected for lack of funds. Mr. Estribou thereupon investigated his records. Up to that time he had supposed that the credit for the \$97,207 which had been entered in the Lofendo account on November 15th had been entered after the items had gone forward for collection under cover of a collection letter and after collection had been effected. Upon receiving this wire he investigated and found that an officer or employee of the Branch had entered

Plaintiff's Exhibit No. 14—(Continued)

immediate credit on the items on November 15th without waiting for collection.

On November 19th, Mr. Estribou caused to be entered in the Lofendo account a credit in the amount of \$113,216.50. No entry of that credit or any part thereof had theretofore occurred. Concurrently Mr. Estribou caused to be entered in the Lofendo account a debit in the amount of \$97,207 to cover the checks whose rejection had been advised by Continental Illinois National Bank.

At the time the wire from Continental Illinois National Bank was received there were insufficient funds in the Lofendo account to cover a charge back of these rejected checks for \$97,207, the balance in the account being at that time only \$14,925.26.

On November 19, 1948, the plaintiff by its Comptroller wrote and mailed to defendant at its East Bakersfield Branch a letter which the latter received on November 22nd, which is already in evidence as Defendant's Exhibit D, and enclosed with this letter the six checks totalling \$113,216.50. Each of these checks had endorsed upon it the notation "Cancelled in error," the notation being signed "F. C. Messenger, Comptroller."

On October 22, 1948, Mr. I. N. Tarr Assistant Cashier and Chief Clerk of defendant's East Bakersfield Branch, prepared and signed a written memorandum which was then initialled by Mr. Estribou, the branch manager, by Mr. Joseph V. Cosgrove, Assistant Manager, and by other officers of

Plaintiff's Exhibit No. 14—(Continued)

the Branch. The paper marked Plaintiff's Exhibit 3 on the Estribou deposition is a true copy and is hereby placed in evidence as plaintiff's Exhibit 12.

On or about November 15 Mr. I. N. Tarr prepared and signed another memorandum which was also then initialled by Mr. Estribou and other officers of the East Bakersfield Branch. The document marked Plaintiff's Exhibit 7 on the Estribou deposition is a true copy of this memorandum, and it is hereby placed in evidence as plaintiff's Exhibit 13.

Further Stipulation

The records of defendant bank show that from the opening of the "Lofendo" account the deposits to it with few exceptions were checks of United Produce Company.

On November 23, 1948, plaintiff orally made demand on defendant in San Francisco that it pay to plaintiff the entire amount in the plaintiff's account with defendant without deduction of the sum of \$113,216.50. On December 4, 1948, plaintiff by its attorneys delivered to defendant a letter of which Exhibit A attached to defendant's answer in this case is a true copy. This was accompanied by another letter of which Exhibit B attached to defendant's answer is a true copy. Accompanying these letters were the 6 checks, Defendant's Exhibit E, and defendant received them.

On December 10, 1948, plaintiff delivered to de-

Plaintiff's Exhibit No. 14—(Continued)

defendant a letter of which Exhibit C attached to defendant's answer is a true copy.

Among the rules and regulations of defendant bank are certain ones known as Standard Practice Manual 214, 220, 510.5 and 512, which are hereby placed in evidence as Plaintiff's Exhibits 16, 19, 20 and 21.

At the close of business at the defendant's East Bakersfield Branch on November 10, 1948, the Lofendo account had a clear credit balance of \$13,-061.17 all in collected funds.

The only transactions thereafter occurring at the East Bakersfield Branch with respect to that account to and including November 17, 1948, are as follows:

November 11, 1948, was a holiday. On the next business day November 12th, checks totalling over \$57,000 drawn on the account arrived and were rejected for lack of funds and nothing was paid out upon them.

On the next day, Saturday, November 13th, the 6 checks, Defendant's Exhibit E, arrived in the mail and were sent out for collection, no credit being entered, all as stated above.

On November 15th, checks drawn on the Lofendo account totalling \$75,586.86 were received at the branch in the in-clearings. These checks were neither rejected nor paid and were not charged against the account but were physically kept at the branch until November 17, 1948, when they were put in the counter-work.

Plaintiff's Exhibit No. 14—(Continued)

November 14, 1948, was a Sunday. On the next business day, November 15, 1948, two groups of checks payable to "Frank C. Lofendo" arrived at the branch, one for \$97,207 and one for \$52,379. As stated above, immediate credit was entered to the Lofendo account for the \$97,207 but not for the \$52,379, and the latter group of checks was sent out for collection under a collection letter.

On November 16th, there arrived at the branch in the in-clearings three checks drawn on the account totalling \$109,569.15 as stated above. These checks were immediately paid and charged against the account as of November 15th. Immediately prior to the charge there stood to the credit of the account the \$13,061.17 of collected funds and the said credit of \$97,207 of uncollected funds. The branch thus paid \$96,507.98 against uncollected funds.

On the same day, November 16, 1948, the defendant's branch received from plaintiff an advice of credit on a collection for \$89,813.10 which had been sent out by the branch on November 10th. This sum was credited to the account on November 17th, thus reducing the amount paid out against uncollected funds to \$6,694.88.

On November 18, 1948, defendant's branch charged against the Lofendo account, as of November 17th, the checks for \$75,586.86 which had been at the branch since November 15th, thereby increasing the amount paid against uncollected funds to \$82,281.74.

Plaintiff's Exhibit No. 14—(Continued)

When the checks of \$75,586.86 received on November 15th there were insufficient funds in the account to pay them and they were listed on the rejected check register, but by reason of oversight of employees of defendant they were not then rejected or returned to the banks from which they had been received, one of which was the plaintiff.

On November 16, 1948, the posting of the credit of November 15 of the checks for \$97,207 referred to in Plaintiff's Exhibit 14 created an apparent balance in the account against which the three checks for \$75,586.86, which had been held over from November 15th could have been charged, but for some reason which the defendant is unable to explain, they were not. Instead the account was charged with the checks for \$109,569.15 received on November 16th as set forth in Plaintiff's Exhibit 14.

After the making of this charge of \$109,569.15 there were insufficient funds in the account against which to charge the checks for \$75,586.86 (which were still on hand), until the advice of credit for \$89,831.10 was later received from the plaintiff on November 16 and the amount thereof was credited to the account on November 17th and posted on the 18th. Concurrently the checks for \$75,586.86 were charged against the new funds.

[Endorsed]: Filed June 19, 1950.

PLAINTIFF'S EXHIBIT NO. 15

COMMERCIAL

Bank of America
NATIONAL TRUST AND SAVINGS ASSOCIATION

DEPOSITED FOR ACCOUNT OF

Frank C. Lofendo

NAME

ADDRESS

DATE

11-19-48

Nov 19 1948

19

CURRENCY (DETAIL ON REVERSE)		DOLLARS					CENTS
COIN							
CHECKS (PROPERLY ENDORSED)							
LIST BY BANK NUMBER SEPARATELY. BELOW, EACH CHECK COMPRISING THIS DEPOSIT.							
Misc. 1	1	113	216	50			
Proceeds of	2						
collection No. 3	3						
419-4768	4						
	5						
	6						
	7						
	8						
	9						

Plaintiff's 5(c) toid
Exhibit

R-2 1-46

[Endorsed]: Filed June 20, 1950.

PLAINTIFF'S EXHIBIT No. 16

Section: Deposits

Sub-Section: Activity of Deposit Accounts

Division: Undesirable Deposit Accounts

No. 214

Date: June 4, 1932.

Subject: Undesirable Deposit Accounts

1. Branch managers are expected to watch their deposit accounts and to make arrangements with depositors for bringing to a profitable basis any which are carried at a loss to the bank or with inadequate profit. This is fully covered in SPM 206.07 and 206.21. Attention must also be given to accounts which are undesirable for other reasons. Depositors must not be permitted to habitually overdraw their accounts or to use them for "kiting" and like transactions. Every effort should be made to hold desirable business and to eliminate unsound conditions. Branch manager should arrange for closing of depositor's account, however, when depositor persists in issuing checks which must be rejected to avoid overdrafts, in "kiting," drawing against uncollected funds, or in other practices which are dangerous to the bank.

2. Undue activity in Savings Deposit accounts must be avoided to extent practicable. Branch manager should endeavor to obtain commercial deposit accounts on a sound basis from savings depositors who make too active use of their savings accounts.

[Endorsed]: Filed June 20, 1950.

PLAINTIFF'S EXHIBIT No. 18

Further Stipulation

In the banking business throughout the United States checks are transmitted by banks to other banks for collection either by means of "cash letters" or "collection letters."

In the case of cash letters, the forwarding bank, when it receives the check from its depositor, gives credit to him at once. The cash letter does not describe individual items, though it may list their amounts, and it usually covers checks drawn by various persons on various banks. A bank to which a cash letter comes gives credit to the forwarding bank for the entire amount of the letter immediately upon receipt of the letter. If any item thereafter is uncollected or unpaid, a charge back may be made of the amount thereof within a given time, the time being prescribed by contract, statute, or rule of a clearing house. In case of a cash letter, the collecting or intermediate bank does not give advice to the forwarding bank of collection but only of rejection. A cash letter contains no instruction on how to remit the funds when collected, and the forwarding bank assumes collection unless advised of rejection.

In the case of a collection letter covering checks, the forwarding bank does not, upon receipt of such check by it, give credit to the depositor or to the bank from which the item comes. The collection letter describes items individually and covers only checks of one drawer. The collection letter contains

instructions on (a) how to remit the funds, when collected, to the forwarding bank, and (b) on how to advise the forwarder of collection. If a letter contains instructions that advice be given of collection or non-collection it is a collection letter. Advice, in the case of a collection letter, is given as to each item individually. Items covered by collection letters do not go through clearing houses. Items covered by cash letters may. In the case of a collection letter the forwarding bank does not assume collection until advised thereof.

Either a cash letter or a collection letter may go to the bank on which the check is drawn.

[Endorsed]: Filed June 20, 1950.

PLAINTIFF'S EXHIBIT No. 19

Section: Deposits

Sub-Section: Receipt of Deposits

Division:

No. 220 (Page 1)

Date: May 28, 1947.

Subject: Receipt of Deposits

1. Checks and drafts on domestic banks and other authorized items (*), properly drawn and which otherwise fulfill sound banking requirements# may be received on deposit for credit of established accounts**, without qualification, to extent warranted by depositor's known reliability and

responsibility or, providing item is known to be genuine, to extent warranted by responsibility of drawer. Credit to an account where such responsibility is not established should be protected by placing of a "hold" on the account.

Memo: Standard procedure for placing a hold is for teller to write in pass book "UCF" (interpreted to customer, if inquiry made, as meaning "Uncollected Funds," —our warning to "Use Caution First") and to stamp "Hold \$. days" (S&S Code 9796) on deposit ticket. "Teller's Deferred Time Schedule" (Tel-51) is provided to record number of days to hold for all points.

"Hold" information must be posted from deposit ticket to lower section of "Stop Payment Folder" (B-116) or if "front feed" bookkeeping machines are used, to "Temporary Hold Order" (B-117). B-116 must be kept over ledger and statement, or B-117 pasted to statement, until the hold expires.

2. Tellers must be on guard to protect the bank from avoidable losses thru fraud, negligence, or error, and especially thru the deposit of fictitious and worthless checks and kiting.

3. Depositor should be asked whether immediate withdrawal is contemplated when a deposit contains:

—out-of-town item(s) larger than depositor's normal balance,

—out-of-town item(s) for recently opened account,

—depositor's own check against an account in another bank.

If Immediate Withdrawal is contemplated, proposed deposit should be referred to an officer for approval. If immediate withdrawal is Not contemplated and deposit is accepted, "Hold" should nevertheless be placed on the account.

[Endorsed]: Filed June 21, 1950.

PLAINTIFF'S EXHIBIT No. 20

Section: Collections

Sub-Section: Outgoing Collection

Division:

No. 510.5 (Page 1)

Date: November 16, 1945.

Subject: Payments for and Return of Outgoing Collections

1. Payments for outgoing collections must be final and in good funds. Drafts on out-of-town points and on other banks or branches must be collected before payment can be considered final. In cases where collection is sent by us to an Intermediary Collecting Bank, which bank under our instructions sends proceeds to another bank for our credit, the account of such depository bank must not be debited upon advice of remittance by

the intermediary bank. Debit may be made Only Against advice received directly from the Depository Bank.

Memo 1: In cases where credit advice from the depository bank is not received promptly when due, "Collection Proceeds Tracer" (C-156) must be sent promptly to such bank Duplicate of this tracer should be sent to Auditing and Inspection Department, Head Office, if depository bank is one of our "Due from" accounts, otherwise to branch where depository bank's "Due to" account is carried. Triplicate should be retained in branch files.

Memo 2: Credit advice from the branch of a correspondent bank is sufficient; confirming advice from such branch's Head Office is not required. Likewise credit advice addressed to our branch which originated the collection is sufficient; confirming advice from our branch or office at which the account is carried is not required.

Memo 3: In cases where a collecting bank has sent telegraphic advice of payment of a non-cash collection but final payment has not been received, or where advice has been received from intermediary collecting bank but not from depository bank, advances may be made to owner, but Only When warranted by the standing of the collecting bank and of the owner.

Any such advances should be charged to "Suspense: Resources," and date and amount re-

corded on Collection Register, together with revised instructions as to disposition of proceeds.

Interest should be charged at prevailing loan rate, counting outstanding time from date of advance in same manner as for "Documentary Drafts" and "Unsecured Drafts," as detailed in SPM 511 paragraph 4, Memo 1. Interest so collected should be credited to "Interest Earned: Loans and Investments."

2. Immediately upon receipt of advice from a correspondent bank, "Due to" or "Due from," showing credit for an outgoing collection, the account of such bank must be debited, using for this purpose "Collection Debit Ticket" (Ac-133). Debit must be made in every case for the exact amount for which credit is advised by the correspondent bank. Two or more collections must not be combined to make one debit when advice shows credit in separate amounts. Likewise, if advice shows credit for more than one amount, the debit should be made for the total, even tho in payment for different items. In such latter case, the collection numbers and amounts of the separate collections should be recorded on back of the debit ticket. Date credited by correspondent bank must be shown on debit ticket in all cases.

Memo 1: Exchange and collection charges deducted by collecting bank, or charged to us by such bank, must be included as a deduction from total collection amount in the case of non-

cash collections; or reimbursement must be obtained from bank's customer in the case of outgoing cash Collections; Except that the obtaining of reimbursement may be waived for items handled by us for correspondent banks when specifically so authorized by Arrangements Book.

Memo 2: Unauthorized deductions by collecting bank must be guarded against, covering items drawn "with exchange," "with collection charges," "payable in New York Exchange," or with similar qualifications.

Memo 3: Controller's Department, Head Office, should be notified, with full particulars, whenever exchange or collection charges made by collecting banks do not agree with schedules shown in Arrangements Book.

[Endorsed]: Filed June 21, 1950.

PLAINTIFF'S EXHIBIT No. 21

Section: Collections

Sub-Section: Outgoing Collections

Division: Outgoing Non-Cash Collections

No. 512 (Page 2)

Date: November 16, 1945.

Subject: Outgoing Non-Cash Collections

(continued)

2. Returns must be final and in good funds (SPM 510.5). Where advice of payment is re-

ceived, if from a correspondent bank, debit ticket must be made to the account of such bank, on "Collection Debit Ticket" (Ac-133; SPM 510.5). Full details of any deductions by collecting bank, and of our charges, must be made on "Branch Permanent Record" copy of Out-Collection Register, and advice copy completed, showing deductions and net amount and date credited. "Paid" stamp (S&S Code 9712) must be imprinted on both copies. Advice copy, showing net amount credited, should be forwarded to depositor. Credit ticket to "Collection Charges" should be made, on Misc-3, detailing the collection number and amount of charges made by us on each collection.

[Endorsed]: Filed June 21, 1950.

PLAINTIFF'S EXHIBIT No. 22

[Plaintiff's Exhibit No. 22 is a Permanent Record to Bank of America Re \$113,216.50, stamped on face a rubber stamp reading "Bank of America N. T. & S. A. Paid November 19, 1948—East Bakersfield Branch, Bakersfield, California."]

Filed June 22, 1950.

PLAINTIFF'S EXHIBIT No. 23

Stipulation Concerning Testimony of
Frank C. Lofendo

Frank C. Lofendo, a resident of Chicago, Illinois, and the man referred to by that name in the evidence in this case, testified by deposition in this case upon subpoena by the plaintiff. Though declining to answer numerous questions on the constitutional privilege against self-incrimination because he is one of the defendants in an indictment pending in the District Court of the United States for the Northern District of Illinois, Eastern Division, entitled "United States of America v. United Produce Company, Ltd., et al.," he did give certain testimony, conveniently summarized as follows:

He was shown and examined the 6 original checks aggregating \$113,216.50, which have already been marked in evidence during the trial as Defendant's Exhibit E. He testified that he had never before seen any of those checks, that he did not place on any of them the rubber stamp endorsement of his name and does not know who did. He does not know when the checks were placed in defendant's East Bakersfield Branch nor who placed them there, and had nothing to do with them or with placing them there. He has never claimed and does not claim any interest in those 6 checks, or in any of them, or in their proceeds, or in any part thereof.

He was also shown the 42 checks last referred to in the testimony of Mr. Gassman, drawn by United Produce Company to the order of "Frank C.

Lofendo." Examining them, he testified that he had never before seen them, that the endorsement of his name which appears on their back by rubber stamp was not placed there by him, that he does not know who stamped his name on the checks nor when any of the checks was deposited at defendant's East Bakersfield Branch and had nothing to do with them or their deposit.

He was further shown the group of checks which have already been marked in this trial as Plaintiff's Exhibit 4 for identification; that is, the checks which were outstanding and unpaid at the time of Mr. Messenger's telephone conversation with Mr. Estribou on November 17, 1948, and which thereafter continued to be unpaid. He refused to answer any questions about them on the constitutional privilege against self-incrimination.

He further testified that he did not buy anything from or sell anything to United Produce Company in either the month of October or November, 1948. He refused to answer on the grounds of self-incrimination whether he had ever theretofore bought anything from or sold anything to United Produce Co.

[Endorsed]: Filed June 26, 1950.

PLAINTIFF'S EXHIBIT No. 27

Western Union
Fast Wire

September 8, 1948, 3:10

Frank Lofendo
c/o Bakersfield Inn
Bakersfield, California

Frank Please Mail Out Some Signed Checks
Tonite Sure. Don't Leave California Until You
Speak to Me. Regards.

LOUIE ROSENTHAL,
United Produce Co.

[Endorsed]: Filed June 26, 1950.

PLAINTIFF'S EXHIBIT No. 31

Mr. Lasky: Will you swear the witness, please,
Mr. Reporter?

Thereupon,

SAM GASSMAN

of lawful age, called as a witness on behalf of the
Plaintiff in the above-entitled cause, having been
first duly sworn, was examined upon oral interroga-
tories and deposed and said as follows:

Direct Examination

By Mr. Lasky:

Q. What is your full name?

A. Sam Gassman.

Q. You are of legal age?

A. I am.

Plaintiff's Exhibit No. 31—(Continued)

(Deposition of Sam Gassman.)

Q. What is your occupation?

A. Right now, I am a Credit Manager.

Mr. Erskine: What?

The Witness: Credit Manager.

Q. (By Mr. Lasky): What is your address?

A. 6454 North Claremont Avenue.

Q. Chicago? A. Yes, sir.

Q. What was your occupation in the year 1948?

A. I was a bookkeeper. [3*]

Q. For whom?

A. For the United Produce Company.

Q. Of Chicago? A. Chicago, Illinois.

Q. And did you have that position throughout the year? A. Of 1948?

Q. Yes.

A. Yes, I did—I should say, with the exception of the end of November, and all of December of 1948.

Q. Well, at least up to about the 20th of November? A. Just about, yes, sir.

Q. Up to that time, you were with them?

A. I was with the United Produce Company, yes, sir.

Q. And you were employed right here in Chicago? A. Yes, sir, I was.

Q. Was that the head office of the United Produce Company?

A. Was what the head office of the United Produce Company?

Q. Chicago. A. Yes, sir.

Plaintiff's Exhibit No. 31—(Continued)

(Deposition of Sam Gassman.)

Q. Where was it located?

A. 1421 South Aberdeen Street, Chicago, Illinois.

Q. Were you Office Manager also of United Produce [4] Company? A. No, I was not.

Q. Did you know a man named Frank C. Lofendo? A. Yes, sir, I did.

Q. Were you acquainted with a bank account at the East Bakersfield Branch of the Bank of America, in California, standing in the name of Frank C. Lofendo? A. Yes, I was.

Q. Now, I show you here, Mr. Gassman, three slips of paper, which purport to be deposit slips on the account of United Produce Company with the Merchandise National Bank. A. Yes, sir.

Mr. Lasky: I show them to counsel. I am not interested in the particular items at all. They are just exemplars.

Mr. Erskine: I see.

Q. (By Mr. Lasky): I will show these to you, now, Mr. Gassman, and ask you the question, whether the handwriting of the letters and numerals is your handwriting? A. Yes, sir, it is.

Mr. Lasky: Mr. Reporter, will you mark these papers as Plaintiff's Exhibit No. 1 for identification, as a group?

(The documents referred to were [5] thereupon marked by the Reporter as Plaintiff's Exhibits Nos. 1-A, 1-B and 1-C, for identification.)

Q. (By Mr. Lasky): Did you take care of the

Plaintiff's Exhibit No. 31—(Continued)

(Deposition of **Sam Gassman.**)

deposits in the United Produce Company account at the Merchandise National Bank?

A. In most cases.

Q. And you kept the bookkeeping records of the United Produce Company with respect to them?

A. I would say, at least 95 per cent of the time.

Q. Now, I show you here also, Mr. Gassman, a batch of photostats of deposit slips in the account that stood in the name of Lofendo at the East Bakersfield Branch of the Bank of America.

Mr. Erskine, these are Exhibit 5 on the Estribou deposition. You remember we stipulated they would take the place of the originals for all purposes.

Mr. Erskine: Yes.

Q. (By Mr. Lasky): I will ask you to look at those, beginning on September 20th, and following, and tell me whether or not the numerals which appear there in handwriting are your handwriting?

A. You mean, all of them?

Mr. Sokol: If you are going to testify to all of them, [6] look at all of them.

Mr. Lasky: Yes, I think you might as well do that.

A. In this bunch (indicating) the numerals are in my writing; but in this other bunch (indicating) they are not.

I don't know how you will identify them.

Mr. Lasky: We will take care of that.

Mr. Erskine: Let me see them, please, the ones that are in your handwriting.

Mr. Lasky: I suggest that the Reporter take the

Plaintiff's Exhibit No. 31—(Continued)
(Deposition of Sam Gassman.)

bunch the witness said were in his handwriting, and mark them as Plaintiff's Exhibit 2 for identification, as a group.

(The documents referred to were thereupon marked by the Reporter collectively as Plaintiff's Exhibit No. 2 for identification.)

Mr. Lasky: The other group, not in his handwriting, is Plaintiff's Exhibit 3.

(The documents referred to were thereupon marked by the Reporter collectively as Plaintiff's Exhibit No. 3 for identification.)

Mr. Erskine: Let me see those, too, please. [7]

Q. (By Mr. Lasky): Now, Mr. Gassman, showing you those that you say are not in your handwriting, and taking this one here—I will restrict the question to the one here dated November 10, 1948, which is a list of figures totaling \$113,216.50. Do you know whose handwriting that is?

A. No, I don't.

Q. Do you know whose handwriting this is, on the other items?

A. I would have to say this: I would only have to guess at the handwriting, whose handwriting it is, in all of these cases, because I don't know for sure.

Q. Well, will you state to the best of your judgment whose handwriting it is, and state the basis for your judgment, upon which you arrive at that

Plaintiff's Exhibit No. 31—(Continued)

(Deposition of Sam Gassman.)

judgment, particularly referring, let us say, to this \$113,216.50 item?

A. Referring to this \$113,216.50 item, the writing on the top, "Frank C. Lofendo, Bakersfield Inn, November 10, 1948," is in my handwriting.

The numerals I believe to be in the handwriting of Frances Sandberg. In my absence, she generally completed the bank deposits.

Q. Well, now, she was an employee of the United Produce Company? [8] A. That is right.

Q. And you had seen her handwriting often, had you?

A. I had seen her handwriting often, yes, sir.

Q. And, basing it upon that familiarity, is it your best judgment that that is her handwriting?

A. Not upon the familiarity with the handwriting, no, sir, as a long period of time has elapsed since I have seen her writing, and I cannot say, for that reason, that this would be her handwriting, only for the aforementioned reason.

Q. I see. Can you say whether or not that deposit slip which you have in your hand, totaling \$113,000 odd, was filled out and prepared in the offices of the United Produce Company in Chicago?

A. It would have to be, because my—well, it would have to be, because my handwriting appears on it.

Q. I see. Well, now, will you look at the others?

I think that this one should be taken out and marked separately by the Reporter as Plaintiff's Exhibit 3-A for identification.

Plaintiff's Exhibit No. 31—(Continued)
(Deposition of Sam Gassman.)

(The document referred to was thereupon marked by the Reporter as Plaintiff's Exhibit No. 3-A for identification.) [9]

Q. (By Mr. Lasky): Now, look at the others in the group.

A. These look to me like the handwriting of Frank C. Lofendo.

Q. I see. All right. Now, Mr. Gassman, I show you here—there was another in connection with that group, but it is all in typewriting, so it will have to speak for itself.

I show you another group, part of Exhibit 5 on the Estribou deposition, and I call your attention to the fact that in each case they have the name written out in longhand at the top "Frank C. Lofendo."

Will you look through there, and tell me if that name is in the handwriting of Lofendo?

A. Well, if I have to testify to all of them, I will have to look at all of them.

Q. Yes, I think that would be wise.

A. All right, sir.

(The documents were examined by the witness.)

Mr. Erskine: Would you indicate to me the ones he said are in the handwriting of Lofendo? Did you identify them?

Mr. Lasky: In the last group?

Mr. Erskine: Yes.

Plaintiff's Exhibit No. 31—(Continued)

(Deposition of Sam Gassman.)

Mr. Lasky: 3-B, 3-C and 3-D.

Mr. Erskine: 3-B, 3-C and 3-D? [10]

Mr. Lasky: Yes, sir.

Mr. Erskine: Thank you.

Q. (By Mr. Lasky): Are you prepared to answer?

A. Yes. I would like to qualify my answer on this particular one, only to the extent I believe these are in the handwriting of Mr. Frank C. Lofendo, for the name and address only.

Q. I see.

A. I don't know his figures, but it seems to me the figures are in his handwriting.

Mr. Erskine: Are in his handwriting?

The Witness: Well, they seem to be in his handwriting.

Q. (By Mr. Lasky): The question I was trying to ask you was confined to the name and address at the top.

A. The name and address, as I said, I believe to be in the handwriting of Frank C. Lofendo.

Q. All right.

A. That is, on this bunch here (indicating). On this one (indicating), I don't know; I don't know whether it is or not.

Mr. Lasky: Mark this first bunch as [11] Plaintiff's Exhibit 4 collectively for identification.

(The documents referred to were thereupon marked by the Reporter collectively as Plaintiff's Exhibit No. 4 for identification.)

Plaintiff's Exhibit No. 31—(Continued)
(Deposition of Sam Gassman.)

Mr. Lasky: And the one as to which he says he does not know, as Plaintiff's Exhibit 5 for identification.

(The document referred to was thereupon marked by the Reporter as Plaintiff's Exhibit No. 5 for identification.)

Q. (By Mr. Lasky): Well, now, on this group, marked collectively as Plaintiff's Exhibit No. 4, can you tell me in whose handwriting the figures appear following the words "U. Pro. Co." that appear on many of the checks?

A. In whose handwriting they appear?

Q. Yes.

A. I am not sure. They look like the handwriting of Frank C. Lofendo, but I am not positive.

Q. Now, I show you a couple of deposit slips, both dated November 13, 1948, each document marked "Exhibit 26-I" on the taking of the Estribou deposition.

Can you tell me in whose handwriting they are?

A. This handwriting is my handwriting. [12]

Q. Throughout?

A. Yes, sir, throughout.

Mr. Erskine: May I see that, please?

Mr. Lasky: Off the record.

(There occurred at this point an informal discussion, outside the record, which was not taken down by the Reporter.)

Mr. Lasky: Now, back on the record. We will mark this as Plaintiff's Exhibit 6 for identification.

Plaintiff's Exhibit No. 31—(Continued)

(Deposition of Sam Gassman.)

(The document referred to was thereupon marked by the Reporter as Plaintiff's Exhibit No. 6 for identification.)

Mr. Erskine: On 5, he does not know?

Mr. Lasky: 5, he does not know about.

The Witness: On that one, I said I don't know whose handwriting that is.

Mr. Lasky: Yes. Now, I have here the remainder of Exhibit 5, in the Estribou deposition, but to avoid stringing out this deposition, I will defer asking about those until the end, so let us just leave them here for the moment.

Q. Now, Mr. Gassman, beginning at what date, to the best of your recollection, were the deposit slips for the Lofendo account at the East Bakersfield Branch of the [13] Bank of America, prepared in the United Produce Company offices?

A. That would be a difficult question to answer.

Mr. Erskine: How is that?

The Witness: I say, that would be a difficult question to answer, right at the moment, because of the long lapse of time; but, as I recall it, I would judge, probably somewhere between—oh, August and October of 1948.

Q. (By Mr. Lasky): Well, now, if I were to call your attention to what appears to be the fact that on these deposit slips prior to September 16th, none of the handwriting appears to be yours, but on the deposit slips subsequent to September 16th, it appears to be yours, from what you have testified: Would that refresh your recollection?

Plaintiff's Exhibit No. 31—(Continued)
(Deposition of Sam Gassman.)

A. Well, of course, that comes within the scope of the dates I have given.

Q. Yes?

A. It comes within the scope of those dates, and that would probably be as close to right, or as accurate, as could be.

Q. That is, the date of September 16th?

A. Yes, sir.

Q. Would that be, to the best of your recollection, the [14] date?

A. Yes, sir, based upon the evidence that we have here.

Q. Yes. Now, did you maintain at the offices of the United Produce Company in Chicago, blank deposit slips of the Bank of America, for use?

A. Yes, sir.

Q. I show you here a little pad of such deposit slips, surrounded by a rubber band, in which there is a slip of paper with the name written in someone's handwriting, in pencil "Dean Howells, Mazzie Farms, PO Box 876, Arvin, California," and then over on the other side, "Bank of America, East Bakersfield, 1200 Baker Street, Baker, California," and ask you if you have ever seen that before?

A. Yes, sir, I have.

Q. Where have you seen it?

A. Probably at the offices of the United Produce Company.

Q. Do you know whose handwriting that is in?

A. That is in my writing.

Plaintiff's Exhibit No. 31—(Continued)

(Deposition of Sam Gassman.)

Q. That slip of paper, with those words on it, is in your handwriting?

A. I don't know whether that was around this little group of deposit slips or not, but I can testify that it [15] is in my handwriting, yes, sir.

Mr. Lasky: I see. Then I will ask the Reporter to mark this slip, this little piece of paper with that writing on it, as Plaintiff's Exhibit No. 7 for identification.

(The document referred to was thereupon marked by the Reporter as Plaintiff's Exhibit No. 7 for identification.)

Mr. Erskine: Would you mind letting me see that, please?

Mr. Lasky: Since the witness has testified that he did maintain a pad of blank deposit slips of the Bank of America in his office, I see no point in putting these blanks in evidence, even though I have detached the slip of paper from them.

Mr. Erskine: Well, you can put in one of them, just as a sample.

Mr. Lasky: All right.

Q. I will show you one of these blanks, and ask you if that is not one of the blanks that was kept in your office there?

A. Well, that is a difficult question to answer. **I have seen blanks like this in my office.**

Q. Just like it?

A. Just like it, yes, sir, but whether this is one that [16] was in the office, I don't know.

Plaintiff's Exhibit No. 31—(Continued)
(Deposition of Sam Gassman.)

Mr. Lasky: All right. That is good enough. I will ask the Reporter to mark this as Plaintiff's Exhibit No. 8 for identification.

(The document referred to was thereupon marked by the Reporter as Plaintiff's Exhibit No. 8 for identification.)

Q. (By Mr. Lasky): When was it you wrote the material appearing on Plaintiff's Exhibit No. 7 for identification? A. When did I write it?

Q. Yes.

A. I don't remember; I don't have the slightest idea. I could only make a guess, as to when I might have written it.

Q. What is your best judgment?

A. From the point of view of the date, I don't know; but the chances are it would have been at a time when I would have had to have some sort of correspondence with Dean Howells.

Q. Well, then, I will ask you this question: From whom did you obtain the name and address of Dean Howells?

A. As I recall it, it was from Mr. Frank C. Lofendo.

Q. Was he in Chicago at the time? [17]

A. I don't know; I don't know at all.

Q. Well, did you get it from him in person, or over the telephone?

A. I don't know; I can't remember.

Q. But you got it from him in some way?

A. I believe that Mr.—I believe that this infor-

Plaintiff's Exhibit No. 31—(Continued)

(Deposition of Sam Gassman.)

mation, for the address, and so forth, came from him. Exactly how I got it, however, or when I got it, I wouldn't know now.

Q. Now, did you make use of these names and addresses, and other information appearing on this slip of paper? A. Did I make use of them?

Q. Yes. A. Yes, sir.

Q. Will you state as to what use you made of them?

A. Deposits that were made in the name of Frank C. Lofendo, were forwarded to Mr. Dean Howells. He in turn would mail the envelope that was enclosed, to the address on the enclosed envelope.

I don't know whether I am making myself clear or not.

Mr. Lasky: I think we can clarify that.

Q. Did you put the deposit slip, together with the item to be deposited, into an envelope? [18]

A. Yes, sir.

Q. I show you here an envelope purporting to be of the Bakersfield Inn. Was it an envelope like that?

A. I don't remember. As I recall it, I believe they had a smaller size envelope.

Q. But did it have the Bakersfield Inn inscription up in the corner? A. Yes, sir.

Mr. Lasky: I will ask that the envelope which the witness now has in his hand, be marked as Plaintiff's Exhibit No. 9 for identification.

Plaintiff's Exhibit No. 31—(Continued)
(Deposition of Sam Gassman.)

(The envelope referred to was thereupon marked by the Reporter as Plaintiff's Exhibit No. 9 for identification.)

Q. (By Mr. Lasky): Did you have a supply of those Bakersfield Inn envelopes in the United Produce Company office? A. Yes, sir, we did.

Q. To be used for the purpose of forwarding these deposit slips? A. Yes, sir.

Q. You say, then, if I understand you, that you put into such an envelope, a deposit slip, plus the items to be deposited? [19] A. Yes.

Q. Was that envelope sealed? A. Yes, sir.

Q. And was it addressed to anybody?

A. The Bakersfield Inn envelope?

Q. Yes.

A. Yes, that was addressed to the Bank of America, Bakersfield, California.

I don't recall the exact address.

Q. Was it the address that appears on this slip of paper, Plaintiff's Exhibit No. 7 for identification, over at the right side?

A. I believe in most cases it was, yes, sir.

Mr. Erskine: Let me see that again, please—pardon me. I did not notice that.

Mr. Lasky: Yes, surely.

Q. And then was that envelope, sealed and addressed as you have described, and containing the items you have described, enclosed in another envelope? A. Yes, sir.

Q. And the other envelope was addressed—have

Plaintiff's Exhibit No. 31—(Continued)

(Deposition of Sam Gassman.)

you testified—to Mr. Howells? A. Yes, it was.

Mr. Lasky: Now, some of these last questions perhaps [20] have been leading, but I was merely endeavoring to summarize what he has already testified to, and there has been no objection so far.

Mr. Erskine: I do not think that they will be prejudicial. I have no doubt that the witness is stating the facts.

Mr. Lasky: Yes.

Q. Now, was that the procedure that was used by you in the forwarding of such deposit slips and deposits, to the Bank of America, from the time when you began to prepare such deposit slips in the office of the United Produce Company?

A. Of course, I again have to rely upon my memory.

Q. Yes.

A. I would not say that in one hundred per cent of the cases, all of the deposits went directly to Mr. Howells. There may have been exceptions to that rule, when they went directly to the bank; there may have been some exceptions to that rule.

Q. I see. But your best recollection is that most of them went to Mr. Howells? A. Yes.

Q. And some of them went to the bank directly?

A. Well, I would say—as you say, most of them went [21] to Mr. Howells.

Q. I see.

A. And a few probably went directly to the bank.

Q. And did any go to anybody else?

A. As I recall it, the answer would be “No.”

Plaintiff's Exhibit No. 31—(Continued)
(Deposition of Sam Gassman.)

Q. All right. Now, what were the items covered by the deposit slips which were sent out in that manner?

A. I don't understand your question.

Q. Well, the deposit slips contained certain items for deposit? A. Yes, sir.

Q. And those items were enclosed with the deposit slip, in the envelope? A. Yes, sir.

Q. What were they? A. Checks.

Q. To whom, and drawn by whom?

A. That, too, would have to be a qualified answer. In most cases the checks were United Produce Company checks, but there were also exceptions to that rule.

At times, included with the deposits, were checks of other parties.

Q. Which were in the control and possession of the United Produce Company? [22]

A. I don't know how to answer that question. You will have to restate it for me.

Q. All right. You say there were checks of other parties? A. Yes.

Q. Where did you get possession of them, in order to put them in the envelope?

A. They came to my desk in the regular course of doing business.

Q. And were they made out to Lofendo, or to others?

A. As I recall it, they had to be made out to Lofendo, in order to be deposited to his account.

Q. Well, now, you will notice, looking at these

Plaintiff's Exhibit No. 31—(Continued)

(Deposition of Sam Gassman.)

deposit slips which you have heretofore examined, as for example Exhibit No. 3-A for identification, that the items are listed, prefixed with the wording "U. Pro. Co." A. Yes.

Q. Does that designation appearing upon the deposit slips, tell you whose checks they were?

A. Yes, sir, that does.

Q. Was it the custom at that time to put on all deposit slips, a notation indicating who had drawn the checks?

A. I believe that was the custom of the individual who was making the deposit. I don't know as there was any [23] specified rule as to doing that, however.

Mr. Erskine: Pardon me, but I do not believe I understand that.

Mr. Lasky: I was referring, Mr. Erskine, to this designation here. (Indicating.)

Mr. Erskine: Oh, I see.

Mr. Lasky: Frankly, I think that the slips will speak for themselves, but I think they all contain those notations.

Q. Now, in the case of checks of the United Produce Company made payable to Lofendo, do you know how the endorsement of the name of Lofendo was placed upon the checks?

A. You would have to give me a period.

Q. All right; I shall.

A. (Continuing): So that I will know what period you are talking about.

Q. Beginning on or about the 16th of Septem-

Plaintiff's Exhibit No. 31—(Continued)
(Deposition of Sam Gassman.)

ber, at the same time that the deposit slips began to be made out in the United Produce Company office, and at the same time your handwriting began to appear on the United Produce Company deposit slips—or rather, I mean, the Lofendo deposit slips.

A. As I recall that, for the first few days those checks [24] were endorsed by Lofendo in his own handwriting.

Afterwards, a rubber stamp was used to put the endorsement on the back of the check.

Q. Now, who had the custody of the rubber stamp?

A. The custody of the rubber stamp was in my possession.

Q. And who purchased the rubber stamp?

A. The rubber stamp, as I recall it, was billed to the United Produce Company. The exact purchaser, I don't know.

Q. I see. Now, I show you here a rubber stamp, with the name "Frank C. Lofendo" on it. Was that that rubber stamp?

A. This looks like the rubber stamp, yes, sir.

Q. If it is not the same one, it looks just like it?

A. If it isn't the same one, it looks just like it, yes, sir.

Mr. Lasky: Mr. Reporter, will you please mark this stamp as Plaintiff's Exhibit 10 for identification?

(The stamp referred to was thereupon marked by the Reporter as Plaintiff's Exhibit No. 10 for identification.)

Plaintiff's Exhibit No. 31—(Continued)

(Deposition of Sam Gassman.)

Q. (By Mr. Lasky): Was the rubber stamp kept in the offices of the United Produce Company at all times? [25]

A. Did you say, at all times?

Q. Yes.

A. I don't know how to answer that question. I mean, it was in the offices of the United Produce Company whenever use had to be made of it. At other times, I don't know.

Q. Well, whenever you had to make use of it, it was there? A. It was there.

Q. And where it was at other times, when you had no use to make of it, you do not know?

A. That is right.

Q. Now, who put the rubber stamp endorsements on the checks?

A. There was more than one individual who put the rubber stamp endorsement on the checks. Whoever was making the deposit, as a rule, put the rubber stamp endorsement on the checks.

These questions sometimes may seem simple, but they are not always as easy to answer as they seem when the question is asked. I would have to say that more than one individual used the rubber stamp to endorse the back of the checks.

Q. Will you tell me their names? [26]

A. Well, I would have to say that I did it; I would have to say that Frances Sandberg did it; and there were probably cases where Mr. Rosenthal did it.

Plaintiff's Exhibit No. 31—(Continued)
(Deposition of Sam Gassman.)

Q. I see.

A. (Continuing): They, however, would probably be far and few, where Mr. Rosenthal did it.

Q. Now, was all this done during periods of time when Mr. Lofendo was not in Chicago?

A. When he was not in Chicago?

Q. At least, when he was not in the offices of the United Produce Company.

A. It was done, but whether he was in the office or not, I couldn't say. [27]

* * *

Q. (By Mr. Lasky): Now, Mr. Gassman, when you enclosed a deposit slip in an envelope addressed to the Bank of America, in the inner envelope, was there also a duplicate deposit slip in there?

A. In there? [28]

Q. Yes. A. Yes, sir, there was.

Q. Now, did the duplicate deposit slips, after they had been stamped by the Bank of America in Bakersfield, come back?

A. Yes, sir, they did.

Q. I will show you a group of such slips, and ask you to look at them, and tell me whether or not those are such slips?

A. It will take a little time, again. This batch here (indicating) includes the triplicate that we kept in our office, and also includes the duplicate that was returned to the United Produce Company office after receipt had been made.

Q. I see. So that the United Produce Company

Plaintiff's Exhibit No. 31—(Continued)

(Deposition of Sam Gassman.)

kept in its office a copy, when it sent forth the other two? A. Yes, sir.

Q. Now, the group—the ones you referred to as “this batch,” let us have them identified. I will take each group separately, and have it identified.

A. I was just going to say——

Q. Yes?

A. ——that I have looked at them closely, although not with an eagle eye, and there may be some few exceptions, [29] or something like that, but generally speaking, the entire group is that.

Mr. Lasky: I will ask the Reporter to mark that group collectively as Plaintiff's Exhibit No. 11 for identification.

(The documents referred to were thereupon marked collectively by the Reporter as Plaintiff's Exhibit No. 11 for identification.)

Q. (By Mr. Lasky): Now, the other group.

A. This group here (indicating) looks like the triplicate copies that were kept in the United Produce Company office, until the receipted copy came back from the bank.

Mr. Lasky: I will ask the Reporter to mark this group collectively as Plaintiff's Exhibit No. 12 for identification.

(The documents referred to were thereupon marked collectively by the Reporter as Plaintiff's Exhibit No. 12 for identification.)

Q. (By Mr. Lasky): From whom did you get

Plaintiff's Exhibit No. 31—(Continued)

(Deposition of Sam Gassman.)

the duplicate deposit slips after they had been stamped with the stamp of the Bank of [30] America?

A. They came directly, as I recall it, from the Bank of America. They were addressed to Frank C. Lofendo, Bakersfield Inn, and then they were forwarded to the United Produce Company, Chicago, Illinois; that is, the Bakersfield Inn forwarded them to the United Produce Company at Chicago, Illinois.

Q. Well, in any event, looking at the envelope, when it arrived at the office of the United Produce Company, the address "Bakersfield Inn" was scratched out—

A. Yes.

Q. —and the address of United Produce Company was inserted?

A. That is right.

Q. When they arrived at the office of the United Produce Company, did someone open them?

A. They were opened up, in the regular course of opening the mail.

Q. By whoever opened the mail in that office?

A. By whoever opened the mail in the office, yes, sir.

Q. And then the contents were kept in the United Produce Company files?

A. The contents were kept in the United Produce Company files, yes, sir. [31]

Q. Now, do you know how checks on the Lofendo account, the so-called Lofendo account, at the East Bakersfield Branch of the Bank of America, were drawn, and how the matter was handled, beginning

Plaintiff's Exhibit No. 31—(Continued)

(Deposition of Sam Gassman.)

about the same time that your name started appearing on these deposit slips?

A. As I recall those transactions——

Q. Well, take it step by step. You do recall how that was handled, do you?

A. Yes, sir, I do recall how it was handled.

Q. Now, I will ask you how it was handled.

Mr. Erskine: Will you let me hear that question again, please, Mr. Reporter?

(The question was thereupon read by the Reporter as above recorded.)

Mr. Riordan: You mean, handwriting, do you not?

Mr. Lasky: Handwriting, yes. I do not mean your name; I mean your handwriting, when your handwriting began to appear on the deposit slips.

A. Now we are talking about the checks which Lofendo issued?

Q. (By Mr. Lasky): Checks drawn on the Lofendo account.

A. Checks drawn on the Lofendo account?

Q. Yes. [32] A. Well——

Mr. Erskine: Pardon me.

The Witness: Yes?

Mr. Erskine: Are you talking about checks drawn on the Lofendo account, or checks drawn by the United Produce Company payable to Lofendo?

Mr. Lasky: No, checks drawn on the Lofendo account.

The Witness: That is why I asked the question;

Plaintiff's Exhibit No. 31—(Continued)

(Deposition of Sam Gassman.)

I want to make sure what I am going to testify to.

Mr. Lasky: Yes. We have already covered the other.

The Witness: You are talking about checks drawn on the Lofendo account?

Mr. Lasky: Yes. We have already covered checks drawn by the United Produce Company to the name of Lofendo.

The Witness: All right. At or about the time that we are talking about—or, I think you said, September 16th?

Mr. Lasky: Yes.

Mr. Erskine: What about September 16th?

Mr. Lasky: He said "at or about September 16th."

The Witness: At or about September 16th—

Mr. Lasky: 1948.

The Witness: 1948.

Mr. Lasky: Yes.

The Witness: Mr. Lofendo would sign in our office, [33] after they had been completed for a time, after a lapse of some time,—he signed many checks in blank, and left them in the United Produce Company office.

Q. (By Mr. Lasky): Now, as of what time did he begin signing them in blank?

A. I can't give you a definite date on that; that would be extremely difficult. The thing that made for him to sign those checks in blank was his not being in the office at the time that the checks were needed.

Plaintiff's Exhibit No. 31—(Continued)

(Deposition of Sam Gassman.)

Q. Well, now, I show you here——

The Witness (Continuing): Not always being in the office, that is, when checks were needed.

Q. (By Mr. Lasky): I show you here a document which I believe comes from the offices of the United Produce Company, and purports to be a copy of a wire, signed Louie Rosenthal, to Frank Lofendo, care Bakersfield Inn, Bakersfield, California, dated September 8, 1948.

Do you wish to see it before I show it to the witness, Mr. Erskine?

Mr. Erskine: Yes. Thank you.

Q. (By Mr. Lasky, continuing): I show you this document, Mr. Gassman, [34] and ask you if that helps to refresh your memory as to the time when Mr. Lofendo began to sign checks in blank?

A. As you refresh my memory now, and as I look at this, I would say, I remember that Mr. Lofendo signed checks in blank while he was still in California.

We asked him to send them—that is, Mr. Rosenthal asked him to send him some, to the United Produce Company office, which he did—or, they came to us with his signature.

Q. Well, then, you do recall, do you, that beginning at least as early as September 8th, blank checks signed by Lofendo in blank arrived through the mails in the offices of the United Produce Company?

A. Yes, I do.

Mr. Sokol: May I see that?

Mr. Lasky: Yes, certainly.

Plaintiff's Exhibit No. 31—(Continued)
(Deposition of Sam Gassman.)

Mr. Sokol: Just as a matter of interest.

The Witness (Continuing): I remember that now. Of course, as I say, it is difficult to remember dates, and exactly how these things happened.

Mr. Lasky: Yes, and that is why we have the documents here. Mr. Reporter, will you mark the document just referred to by the witness as Plaintiff's Exhibit No. 13 for identification? [35]

(The document referred to was thereupon marked by the Reporter as Plaintiff's Exhibit No. 13 for identification.)

(There was a brief discussion outside the record.)

Q. (By Mr. Lasky): Is it a fact that through October and November you had—and when I say “you,” I mean, the United Produce Company had in its office, blank checks of the East Bakersfield Branch of the Bank of America, signed in blank by Lofendo? A. Yes, sir.

Q. Now, I will show you——

A. (Continuing): When I use the word “we,” I mean, the United Produce Company.

Q. Yes? A. If I may qualify it that way.

Q. Very good. Now, I will show you here a whole bunch of checks of the East Bakersfield Branch of the Bank of America, in blank, but purporting to have Lofendo's signature.

Are those some of the checks?

A. I would have to answer “Yes,” that these are the same checks that were in the offices of the

Plaintiff's Exhibit No. 31—(Continued)

(Deposition of Sam Gassman.)

United Produce Company at the time that I left them. [36]

Q. Well, at the time you left there in November, late in November of 1948, was there a large number of checks just like those? A. There were.

Mr. Lasky: I will ask the Reporter to mark this whole batch of checks collectively as Plaintiff's Exhibit No. 14 for identification.

(The checks referred to were thereupon marked by the Reporter collectively as Plaintiff's Exhibit No. 14 for identification.)

Q. (By Mr. Lasky): Now, was there in the offices of United Produce Company, a check book of blank checks of the East Bakersfield Branch of the Bank of America, like these (indicating) which I now hand you?

A. Yes, sir, there was one like this. Whether this is the same one or not, I don't know.

Q. But at the time you left——

A. At the time I left, there was one.

Q. ——which looked like that?

A. Yes, sir, which looked like that.

Q. And from day to day did you—and when I say “you,” I mean, the United Produce Company, obtain from Frank [37] Lofendo his signature on those blanks?

A. Yes, sir—that was Mr. Rosenthal's job.

Q. Did he do so?

A. Mr. Rosenthal would ask Frank Lofendo to sign those checks.

Plaintiff's Exhibit No. 31—(Continued)
(Deposition of Sam Gassman.)

Q. Do you know that of your own knowledge?

A. I have heard him, yes, sir; I have heard him ask him.

Q. You have heard Mr. Rosenthal ask Mr. Lofendo?
A. Yes, sir.

Q. And have you seen Mr. Lofendo sign the checks?
A. Yes, sir, I have.

Q. But otherwise, they were in blank?

A. Yes, sir.

Mr. Lasky: I ask that the book be marked by the Reporter as Plaintiff's Exhibit No. 15 for identification.

(The book referred to was thereupon marked by the Reporter as Plaintiff's Exhibit No. 15 for identification.)

Q. (By Mr. Lasky): Do you know, and can you tell us, how the blank checks which were signed by Lofendo, but otherwise in blank, were filled out and completed, so as to be completed checks?

You may answer that question yes or no. [38]

A. Yes, sir.

Q. All right. Now, will you tell us how that was done?

A. Instructions were given to anybody who was to fill them in, as to what amounts, and what payee, were to be inserted above the signature; and the person who did the typing was the one who filled in the information.

Q. Now, who was such person?

A. In most cases, it was Miss Frances Sandberg,

Plaintiff's Exhibit No. 31—(Continued)

(Deposition of Sam Gassman.)

as she was the typist working—making out the checks.

Q. In the employ of the United Produce Company?

A. In the employ of the United Produce Company, yes, sir.

Q. And in other cases?

A. In other cases, Mr. Lofendo could have made out the checks, in times prior to this September date that we are talking about.

Q. Well, I am confining it from the September date——

A. From the September date on?

Q. Yes.

A. There were exceptions to that rule, where the girl made them out, or I might have typed in some myself, upon instructions from one of the officers of the corporation.

Q. I see. [39]

A. In addition, as I recall the circumstances, Mr. Rosenthal took some checks with him away from the office, signed in blank by Mr. Lofendo, and who completed them, I don't know, as I was not a witness to the completion of the checks.

Q. All right. Now, you say that these checks signed by Lofendo in blank, were filled out with the name of the payee, and the amount, upon someone's instructions?

A. Yes, sir.

Q. Whose instructions?

A. The instructions in most cases were Mr. Rosenthal's.

Plaintiff's Exhibit No. 31—(Continued)
(Deposition of Sam Gassman.)

Q. Do you know that of your own knowledge?

A. I know that of my own knowledge, yes, sir, because he gave them verbally to me.

Q. I see. Now, in the other cases, when Mr. Rosenthal did not give instructions, who did?

A. That is extremely difficult to remember. There may have been just a rare case where an exceptional check may have been instructed by someone else, but I can't at this time remember if there was anybody else.

Q. Then except for such rare cases, the instructions were Mr. Rosenthal's?

A. Except for the rare cases, the instructions were Mr. Rosenthal's, yes, sir. [40]

Q. Who was Mr. Rosenthal? We have not identified him as yet.

A. Mr. Rosenthal was secretary-treasurer of the United Produce Company.

Q. Now, after those checks had been filled out—and I refer to checks signed in blank by Lofendo—after they were completed, as to payee and amount—was that done on a typewriter? Is that the way they were completed? A. Most of the time.

Q. All right. And after that was done, what was done with those checks?

A. Those checks were at that time either mailed, or brought—or, no. I am sorry. I am getting a little mixed up. It depends upon who the payee was, in a particular case, so I can't give a general answer to that question at all.

You would have to identify the payee.

Plaintiff's Exhibit No. 31—(Continued)

(Deposition of Sam Gassman.)

Q. All right.

A. So that I can proceed to answer the question.

Q. I will see if I can do that. I show you here a document consisting of numerous pages of penciled notations, on plain white paper.

I show you this, and ask you if you recognize [41] it?

A. Yes, I do.

Q. What is it?

A. It is a day-to-day control, so to speak, of checks drawn on the Lofendo account, and checks deposited to the Lofendo account.

Q. Who prepared it?

A. Who prepared this?

Q. Who made it, who kept it?

A. I kept this.

Q. Whose handwriting is it?

A. Probably, in most cases, mine; I would say, in by far the greatest majority of cases mine.

As I glance through it, it looks like it is all mine, but there may have been an occasional exception or two where it is not my writing.

Q. Well, now, I show you these columns, as you can see.

A. Yes.

Q. There is a line drawn vertically through the page.

A. Yes.

Q. So that there is a lefthand column, and a righthand column.

A. Yes, sir.

Q. The righthand column is entitled "Checks mailed to [42] him"—

A. No; it says "Our checks mailed to him."

Plaintiff's Exhibit No. 31—(Continued)
(Deposition of Sam Gassman.)

Q. At the very top are the words "Frank C. Lofendo." A. Yes.

Q. In your handwriting? A. Yes.

Q. And in the lefthand column it says "Our checks mailed to him." A. Yes, sir.

Q. Is that right? A. Yes, sir.

Q. And is that a list of the checks of United Produce Company, payable to the name of Lofendo?

A. Again, in most cases I would say "Yes," it is. However, there is an occasional check on the lefthand column, which was not a United Produce Company check.

Q. I see. Well, now, take the righthand column. What is that labeled?

A. That is labeled "His checks issued."

Q. And does that list every check that was drawn on the Lofendo account, beginning in March of 1948?

A. You are giving me a date which I don't know, although I see here that there is a 3/30 date.

How much earlier this goes back to, I don't [43] know.

Q. Well, you have here, however, in the right-hand column, some numbers beginning with 301 opposite amounts. A. Yes.

Q. Are those check numbers?

A. Yes, sir, they are.

Q. Now, what was the purpose of that document; what was the purpose of your maintaining that list? A. Maintaining this list?

Q. Yes.

Plaintiff's Exhibit No. 31—(Continued)

(Deposition of Sam Gassman.)

A. So that the United Produce Company would know how much of a balance there was in the Frank C. Lofendo account, or whether there was a sufficient amount of checks issued and deposited by him, to cover——

Q. Do you mean, issued and deposited by him, or——

A. Issued—whether there was sufficient—let me restate that.

Q. Yes.

A. I mean, whether there was a sufficient amount of checks made payable to Frank C. Lofendo as payee, and deposited by him in the Bank of America, at Bakersfield, California, to cover the checks which were drawn by him against his account in Bakersfield, California.

Q. Now, when you say “drawn by him” do you include in [44] that the checks which were signed in blank by him, and filled out in the United Produce Company office? A. Yes, sir.

Q. Now, did you make any symbol on this list which would indicate which of the checks drawn on the Lofendo account were made payable to the United Produce Company, and which were not?

A. Well, right at the beginning, as this list indicates, I wrote the payee right opposite the amount.

Then later on, as I recall it now, I stopped doing that, and only identified those checks that were not made payable to the United Produce Company. In other words, all checks that were not identified

Plaintiff's Exhibit No. 31—(Continued)

(Deposition of Sam Gassman.)

with some symbol, or with some letter, or something, I believe to be made payable to the United Produce Company, unless I made an error at the time that I was doing it.

Q. Unless you indicated otherwise, then, the checks were payable to the United Produce Company? A. Yes, sir.

Q. Did you make this list up from day to day?

A. Well, I kept it running from day to day.

Q. I see. It was a current record?

A. A current record.

Mr. Lasky: I will ask the Reporter to mark the paper [45] just referred to by the witness as Plaintiff's Exhibit 16 for identification.

(The document referred to was thereupon marked by the Reporter as Plaintiff's Exhibit No. 16 for identification.)

Q. (By Mr. Lasky): Now, Mr. Gassman, directing your attention to these checks, as shown on the list which we have just had marked, which were made payable to the United Produce Company, drawn on the Lofendo account: What was done with those after they were completed in the United Produce Company offices?

A. Those checks were then, in turn, turned over to the Merchandise National Bank, in Chicago, in payment of loans which they had made to the United Produce Company.

Q. Now, what about the checks signed in blank by Lofendo, and filled out in the United Produce

Plaintiff's Exhibit No. 31—(Continued)

(Deposition of Sam Gassman.)

Company offices, to payees other than United Produce Company? What was done with those?

A. Well, those checks were then either distributed, or mailed, or in some way they got to the payees they were intended for.

Q. In connection with business of the United Produce Company? [46]

A. Why, I would rather assume that it was, though I don't know, sir.

Q. Do you know whether or not they were used to pay obligations of the United Produce Company?

A. I don't know that either, sir.

Mr. Lasky: I see. Now, Mr. Erskine, do you have the original checks?

Mr. Erskine: Yes.

Q. (By Mr. Lasky): I show you here six checks which have been marked on the taking of the deposition of a man by the name of Estribou, as Exhibits 13, 14, 15, 16, 17 and 18 for identification, and ask you to look at them, please.

A. Yes, I have.

Q. You have looked at them?

A. Yes, sir.

Q. Now, I call your attention to the fact that they are all made payable to Lofendo, dated November—what is the date, the 10th?

A. The 8th.

Q. (Continuing): —8th, 1948, and if you will look on the reverse side, you will find in rubber stamp, Frank C. Lofendo, as the endorser.

A. Yes, sir. [47]

Plaintiff's Exhibit No. 31—(Continued)
(Deposition of Sam Gassman.)

Q. Can you state where that endorsement was placed on them?

A. That endorsement was placed on them in the same office as that where the stamp was.

Q. Of the United Produce Company?

A. Yes, sir.

Q. And do you know who put it on there?

A. That would be difficult to say at this time. As I explained before, whoever was handling it at that particular time, could have put the rubber stamp endorsement on them.

Q. Some employee? A. Yes.

Q. Of the United Produce Company?

A. An employee of the United Produce Company, yes, sir.

Q. Now, after those checks had been so endorsed, will you state how they were transmitted to the Bank of America—well, I believe you stated before, that it was done in the manner you have described. A. Yes, sir.

Q. For all such checks similarly endorsed?

A. Yes, sir.

Q. They were placed in an envelope, addressed to the Bank of America? [48]

A. No, sir, they were placed in an envelope addressed to the Bank of America, and then that envelope placed in another one, addressed to Dean Howells.

Mr. Lasky: Now I am going to return these to you, Mr. Erskine. They are sufficiently identified for our record, are they not?

Plaintiff's Exhibit No. 31—(Continued)

(Deposition of Sam Gassman.)

Mr. Erskine: I think so.

Mr. Lasky: So that we do not need to put photostats in here.

Q. I show you, Mr. Gassman, a series of checks that were marked the other day, in the taking of the deposition of Mr. Messenger, as Defendant's Exhibits 11-A, 11-C, 11-E, 11-G, 11-I, 11-K, 11-L, 11-M, 11-N, 11-O, 11-P, 11-Q, 11-R, 11-S, 11-U, 11-X, 11-Y, 11-W, and 11-Z, and ask you to look at these, please. (Handing documents to the witness.)

A. Yes, sir.

Q. You have looked at those? A. Yes, sir.

Q. You will notice that these checks are dated November 1st, November 3rd, November 5th, November 6th, November 8th, November 9th, November 10th, November 12th, and I believe that there are some on the 11th, and similar dates—November 13th—1948.

Can you tell me whether or not these were [49] checks which were signed originally in blank by Frank C. Lofendo?

A. I can't definitely tell you that, whether they were previously signed in blank by Frank C. Lofendo or not, based upon what I said before, that we did have a lot of signed checks in the offices of United Produce Company, and I would assume—well, I won't say that.

Mr. Erskine: Well, now, I don't think you should state your assumption.

The Witness: No, I don't want to say that.

Q. (By Mr. Lasky): State your best recollection.

Plaintiff's Exhibit No. 31—(Continued)
(Deposition of Sam Gassman.)

A. As I recollect it at the present time, these checks did come from the batch of blank checks that we had in the office of United Produce Company at that time.

Q. Now, during the month of November, 1948, can you state what proportion of the checks that were drawn on the Lofendo account, were filled out on checks that had been signed in blank by Lofendo?

A. By far the greatest majority; it would probably vary anywhere from 90 to 99 per cent.

Q. Can you recall any at all, in the month of November, that were not originally signed in blank by Lofendo, and filled out in the manner you have previously described? [50]

A. I can't recall any, but that wouldn't necessarily mean that there were not any.

Q. I see. All right. Did Mr. Lofendo give anything to the United Produce Company for the United Produce Company checks made out to him and endorsed by means of the rubber stamp?

A. I don't understand your question.

* * *

Q. Well, checks are ordinarily issued in payment of something, I assume. Did Mr. Lofendo make payment of anything to the United Produce Company? A. Did he make payment——

Mr. Sokol: A quid pro quo.

The Witness: No.

Mr. Sokol: A "this" for a "that"? [51]

The Witness: No.

Plaintiff's Exhibit No. 31—(Continued)
(Deposition of Sam Gassman.)

Mr. Sokol: If I give you a check, it is generally assumed that you give me something back, or that I owe it to you, or something.

The Witness: I understand.

Mr. Sokol: Off the record, if you please.

(There occurred at this point an informal discussion, outside the record, which was not recorded by the Reporter.)

The Witness: To my knowledge, United Produce Company did not receive anything for the checks which were given to Mr. Lofendo.

Mr. Erskine: Pardon me. You said, "Not to my knowledge." Do you mean by that, so far as you know?

The Witness: Yes, sir, that is what I mean.

Mr. Erskine: All right.

The Witness: So far as I know.

Q. (By Mr. Lasky): You were the bookkeeper, were you not? A. Yes.

Q. Of United Produce Company?

A. Yes, sir.

Q. And you had supervision of the United Produce Company books? [52]

A. Everything except accounts payable.

Q. Except accounts payable? A. Yes.

Q. All right. Now, from your familiarity with the books, do you recall having seen anything, or any record of anything that Lofendo gave for those checks which were made payable to him, and endorsed by means of the rubber stamp?

Plaintiff's Exhibit No. 31—(Continued)
(Deposition of Sam Gassman.)

A. That would be a very difficult question for me to answer. There was a lot of cards, by that I mean, bookkeeping cards, that had Mr. Lofendo's name on them, as shipper; but whether United Produce Company actually got actual cars, I don't know, where they were marked with his name.

Q. When such checks were entered in the books of record of the United Produce Company, those checks made payable to Lofendo and endorsed by means of the rubber stamps, what were they recorded as being for?

Mr. Erskine: Now, I assume that the books themselves would be the best evidence, but I will not press the objection. I have reserved my objection, so never mind. Subject to my reservation, go ahead.

The Witness: Would you restate the question, please.

Mr. Lasky: Read it, please, Mr. Reporter. [53]

(The question was thereupon read by the Reporter as above recorded.)

A. Checks were issued to Lofendo in payment of cars, as indicated, when payment was requested, or in those cases where they were not made in payment of cars, they were supposed to have gone as pre-season advances to Lofendo.

In other words, there were two types—I mean, the checks that were issued were either as an advance, charged to his account, or in payment of

Plaintiff's Exhibit No. 31—(Continued)

(Deposition of Sam Gassman.)

cars that he purchased, as far as I was familiar with it.

Q. (By Mr. Lasky): Can you tell us, when the record shows something about cars, whether any such cars were actually shipped?

A. Not being the traffic man——

Mr. Erskine: How?

A. I say, not being the traffic man, I couldn't say for sure that those cars were not shipped; but from my familiarity——

Mr. Erskine: Well, now, just a moment.

Q. (By Mr. Lasky): He has the right to answer, on his familiarity. Let him answer.

A. (Continuing): From my familiarity with what was [54] transpiring in the United Produce Company offices, by far the greatest portion of those checks were not in payment of cars actually shipped.

Q. All right. Now, did United Produce Company give to Mr. Lofendo anything for the checks signed in blank by him, and filled out in the United Produce Company's name there in the offices of the United Produce Company?

A. I am sorry, but I don't understand that question.

Mr. Lasky: I will rephrase it.

Q. You have already testified that there were certain checks signed in blank by Lofendo, and left at the offices of the United Produce Company, and from time to time the payees and the amounts were filled in, and in a great number of them the payee's name was that of the United Produce Company.

Plaintiff's Exhibit No. 31—(Continued)
(Deposition of Sam Gassman.)

A. Yes, sir.

Q. Now, in such cases, did the United Produce Company give anything to Lofendo for those checks?

A. Did the United Produce Company give anything to Lofendo for those checks?

Q. Yes.

A. No, sir, except that additional checks were issued by the United Produce Company, to be mailed, or to be sent to the Bank of America, to cover those checks that were [55] issued.

Q. I see. In other words, when a check signed in blank by Lofendo was filled out in some amount, and the name of the United Produce Company put in there, then somewhere about the same time a check of the United Produce Company was made out to Lofendo, stamped with the rubber stamp, and sent out in the manner you have described?

A. That is right. In other words, it was done approximately within one day, at the most.

Q. And you maintained this record, which has been identified as Plaintiff's Exhibit No. 16, to see that the amount of checks going both ways, balanced; is that correct?

A. Well, the general objective was that there would be more money in the Bank of America account—or, in Mr. Frank C. Lofendo's account, than there was drawn against them, so as to maintain a balance there, which the Bank of America requested from Mr. Frank C. Lofendo.

Mr. Erskine: Well, now, just a moment. How

Plaintiff's Exhibit No. 31—(Continued)

(Deposition of Sam Gassman.)

do you know that the Bank of America requested that?

Mr. Lasky: I will take care of that. You may cross-examine him in proper order, Mr. Erskine.

Q. (By Mr. Lasky): I will ask you that question myself: In what manner did it come to your knowledge that the Bank of America had requested a balance be maintained in the Frank C. Lofendo account?

A. It came to my knowledge from Mr. Rosenthal, who informed me about trying to keep approximately \$20,000 to \$30,000 balances in Mr. Lofendo's account, as that was requested of Mr. Lofendo by the Bank of America.

Q. And when was it that Mr. Rosenthal told you that?

A. I don't know the exact date, but—— [57]

* * *

Q. (By Mr. Lasky): You were interrupted; proceed, please.

A. (Continuing): ——but after there had been some difficulty between the checks that were—that is, with respect to the balance of the account that Mr. Lofendo was maintaining at the Bank of America, in Bakersfield, as I recall it, there was a trip to California by Mr. Lofendo and Mr. Rosenthal, the exact date of which I don't know at this time.

Q. I see.

A. (Continuing): With reference to the bank account of Mr. Frank C. Lofendo.

Plaintiff's Exhibit No. 31—(Continued)
(Deposition of Sam Gassman.)

Q. Well, now, with respect to the conversation between you and Mr. Rosenthal, with respect to a trip made to California by Mr. Rosenthal and Mr. Lofendo: Was the conversation before or after that trip?

A. The conversation with reference to maintaining the balance?

Q. Yes. A. Is that what you mean? [58]

Q. Yes.

A. I believe that was after the trip.

Q. To the best of your recollection?

A. To the best of my recollection, yes, sir.

Q. About how long after it?

A. Oh, it would be difficult to say.

Q. Approximately.

A. Probably within four, five or six days, anyway, from the time he returned—well, probably immediately upon his return, or shortly thereafter.

Q. Is that to the best of your recollection?

A. Yes, sir.

Q. All right. Now, so that the record will be straight, will you repeat what that conversation was, what Mr. Rosenthal told you at that time?

A. Mr. Rosenthal told me at that time that the Bank of America requested that a balance of somewhere between \$30,000—or around, I should say, \$30,000, or thereabouts, be maintained in the Frank C. Lofendo account; and, in keeping those records, we tried to mail sufficient checks to the Frank C. Lofendo account to keep the balance somewhere between \$20,000 and \$30,000.

Plaintiff's Exhibit No. 31—(Continued)

(Deposition of Sam Gassman.)

Q. And did Mr. Rosenthal tell you to do that?

A. Yes, he did. [59]

Q. Did you follow those instructions?

A. Yes, I followed those instructions that were given to me by the officer of the company.

Q. In other words, you caused the completed checks, in sufficient amount, to be sent out to Bakersfield for that purpose?

A. That is right.

Q. Now, did you ever give to Mr. Lofendo any record of the checks drawn on his account?

A. Did I ever give any record to him?

Q. Yes.

A. Well, of course, he had the statements originally which came back, and he in turn turned them over to the United Produce Company.

Q. Did you ever give to him any record of the checks signed by Lofendo, and payable to the order of United Produce Company?

A. I don't follow your question.

Q. Well, first I asked you about checks which United Produce Company made payable to the name of Lofendo.

A. Yes.

Q. And now I am asking you about the other, the reverse.

A. Oh.

Q. That is, checks signed by Lofendo on the East Bakersfield [60] Branch account, and payable to the United Produce Company.

A. I understand.

Q. You maintained a record of those checks.

A. Yes, sir.

Q. Did you ever give a record to Lofendo?

Plaintiff's Exhibit No. 31—(Continued)
(Deposition of Sam Gassman.)

A. Of the exact—well, it wasn't the rule, I will say, for him to want to know exactly what was going on with the account after he returned from California.

Prior to that time he was more or less familiar with the status of the account. After he came back from California, however, he was not too familiar with what was transpiring in the account.

Q. Well, now, you did not give him a record of what was going on in the account, did you?

A. Well, I couldn't definitely say that I did not give him a record, no, sir. He may have inquired sometime during the business hours, as to what was going on there, and I might have told him; but from the point of view of telling him exactly, from day to day, or being familiar with every single item that was transpiring through that account—he definitely was not.

Q. You say that he was not familiar—that after he came back from California, he was not familiar with the [81] status of the account. How do you know he was not familiar with the condition of the account?

A. Well, he wouldn't see the checks that were being issued in most cases, after he had signed a check in blank.

Mr. Lasky: Now, Mr. Erskine, I want to bother you again for those six checks.

Mr. Erskine: Yes.

Q. (By Mr. Lasky): We showed you here a

Plaintiff's Exhibit No. 31—(Continued)

(Deposition of Sam Gassman.)

while ago six original checks, marked as Exhibits 13 to 18 both inclusive on the Estribou deposition.

Did you ever show those to Lofendo?

A. Did I ever show these to Lofendo?

Q. Yes.

A. The chances are he didn't see them, but I couldn't say that I didn't show them to him or that I did show them to him; I don't know.

Q. Do you have any recollection at all?

A. That would be an extremely difficult matter. With the volume of checks that we handled, to pick any checks out of the air, and ask me if I showed them to him—I wouldn't know.

Q. Well, what proportion of the checks made payable to Lofendo were shown to him?

A. Oh, an insignificant portion, if any. [62]

Q. Now, let me ask you this question: Can you state whether the funds passing into the Lofendo account on the basis of the United Produce checks, were disbursed by checks prepared in the United Produce Company offices?

A. Repeat that.

Mr. Lasky: Will you read it, please.

(Thereupon the question was read by the Reporter as above recorded.)

A. As I stated before, by far the greatest majority of the checks that were drawn on the Lofendo account, were issued in the United Produce Company offices; but there were also exceptions to that rule, as stated before.

Q. (By Mr. Lasky): Were those checks drawn

Plaintiff's Exhibit No. 31—(Continued)

(Deposition of Sam Gassman.)

on the Lofendo account, used for United Produce Company purposes?

A. Those that were made payable to the United Produce Company, were used for United Produce Company transactions.

Q. Now, how about those which were made payable to Max Felbaum & Co.?

A. Those that were made payable to Max Felbaum & Company were also used for United Produce Company purposes.

Q. How about those made payable to—I think it was Alfinito & Company—or J. Alfinito & Company? [63]

A. Those also were United Produce Company purposes, or transactions.

Q. And Gene Tufo—those made payable to Gene Tufo?

A. I can't definitely say in that case whether they were or not.

Mr. Lasky: I was going to bring some checks so made payable, but unfortunately, I do not have them with me here.

Q. Now, I show you here a batch of documents that were marked on the deposition of Mr. Messenger as Defendant's Exhibits 26, 27, 28, 29, 30 and 31 for identification, each one of which consists of a number of parts, A, B, C, D, E, and so forth, and ask you to look at these. I will give all of them to you.

A. Yes, I have looked at them.

Q. These others down here also (indicating) are

Plaintiff's Exhibit No. 31—(Continued)

(Deposition of Sam Gassman.)

part of the group.

A. Then I had better look at all of them.

Mr. Lasky: Yes. Incidentally, Mr. Reporter, I think that this record should disclose among the appearances, that of Mr. Sokol, as attorney for the witness.

Q. You have now looked, Mr. Gassman, at Exhibits 26, 27, 28, 29, 30 and 31? A. Yes. [64]

Q. Are you familiar with those papers?

A. Yes—I have seen them.

Q. Will you state what they are?

A. They are assignments of loans to Merchandise—or, no. I am trying to think of the word to use. These are names of accounts, and the assignments and scheduled listings of the accounts, that were turned over to the Merchandise National Bank, upon which the Merchandise National Bank based their loans to the United Produce Company.

Q. Now, did you physically take those papers down from time to time to the Merchandise National Bank? A. Yes, sir, I did.

Q. And at the time you took those down to the Merchandise National Bank, and delivered them to that bank, were they all filled out, or was there nothing on there but the rubber stamp over the signature of Mr. Rosenthal?

A. No, they were completely filled out on the typewriter of the United Produce Company.

Q. Now, as an illustration, I will take Defendant's Exhibits 30-A and 30-B. You will notice that 30-B shows a rubber stamp. A. Yes, sir.

Plaintiff's Exhibit No. 31—(Continued)

(Deposition of Sam Gassman.)

Q. And a legend. [65] A. Yes.

Q. "United Produce Company, by"—the signature; is that correct? A. Yes.

Q. Rosenthal's signature?

A. Yes, Rosenthal's signature.

Q. And everything appearing above that signature in typewriting: Was that in there, when delivered to the bank? A. Yes, sir.

Q. And is that also true of all the other exhibits that have just been referred to? A. Yes, sir.

Mr. Lasky: Now, since these have been identified in the deposition of Mr. Messenger, I take it we do not have to make copies for this deposition.

Mr. Erskine: Oh, no.

Q. (By Mr. Lasky): Now I show you here a batch of checks of the United Produce Company, bearing the name of Frank C. Lofendo, and bearing the dates of November 13th, 16th, 17th, and I believe there are some on the 19th here, which appear never to have been cancelled.

Does counsel want to see them? [66]

Mr. Erskine: Yes.

Mr. Lasky: I show them to you.

A. Yes, sir, I have seen them.

Q. (By Mr. Lasky): Tell me what those are.

A. These are checks of the United Produce Company, made payable to Frank C. Lofendo, and endorsed with the rubber stamp previously mentioned, on the back of the check.

Q. When were they prepared?

Plaintiff's Exhibit No. 31—(Continued)

(Deposition of Sam Gassman.)

A. When were they prepared?

Q. Yes.

A. That is a difficult question to answer. The date, as it appears on the check, may not be the date of preparation.

Q. Will you explain how that came about?

A. Well, I will have to think about that for just a moment, if I may.

Q. Yes.

A. As a rule, most of the checks were dated on the day they were prepared, but that does not necessarily mean, however, that it would be that date, for the reason that if there were a lot of checks going to the bank on that particular day, in order to make it appear as if not all [67] of those checks were issued on the same date to him, the dates would be changed.

Q. Did you prepare checks of United Produce Company payable to the name of Frank C. Lofendo, and have them ready for use whenever you wanted to get a proper balance in the Lofendo account?

A. Well, the procedure was one of—it was a matter of expediency. In other words, the United Produce Company generally had some idea as to what deposit they would have to make during the day, in order to cover checks that would clear during that day on the United Produce Company account, and those checks were prepared at the first moment of spare time during the day, during the course of the day's business.

Plaintiff's Exhibit No. 31—(Continued)
(Deposition of Sam Gassman.)

In other words, they were not prepared at any special time; they were prepared as the occasion arose, or as we had the time to do them, and then whether an additional check had to be added or one held back, or something like that, was a matter of judgment, and things of that sort, for the individuals involved, during the day.

Q. Well, then, by means of your record, Plaintiff's Exhibit No. 16 for identification, did you determine when it was desirable to send out to the East Bakersfield [68] Branch of the Bank of America, the checks payable to Frank C. Lofendo?

A. Yes, sir.

Q. Now, those particular checks that you have in your hand there, Mr. Gassman, were never used?

A. Well, from appearances, it would seem that they were not used.

Q. Can you explain how it happened that those were not used?

A. I don't really know; I don't even know where they were, or where they came from, except the fact that they were issued to him.

The only thing that I can say is that they were probably mailed to him, as other checks were, and noting the dates on them, although as I say those dates may not be exactly correct, though they would not be off by probably more than one or two days—noting that they came close to the time when the United Produce Company ceased operating, what

Plaintiff's Exhibit No. 31—(Continued)

(Deposition of Sam Gassman.)

probably happened was that they never got into the bank.

Q. Well, I will ask you this question, Mr. Gassman: At the time you left United Produce Company, late in November, I think you have already testified that there was a group of signed blank checks, signed in blank by Lofendo. [69]

Was there also, do you recall, a group of checks of United Produce Company, made out to Lofendo, and stamped with the rubber stamp endorsement, but not yet sent out to Bakersfield?

A. There were no such checks.

Q. You do not recall any such?

A. No, sir, I don't recall any such. Those checks were prepared as they were needed to cover deposits.

Mr. Lasky: I will ask the Reporter to mark this group of checks as Plaintiff's Exhibits 17-A to 17-S both inclusive for identification.

(The documents referred to were thereupon marked by the Reporter as **Plaintiff's Exhibits** 17-A to 17-S, both inclusive for identification.) [70]

* * *

Mr. Lasky: I will reframe the question.

Q. Was the account in the name of Frank C. Lofendo, at the East Bakersfield Branch of the Bank of America in California, just another pocket of the United Produce Company, out of which it operated?

Plaintiff's Exhibit No. 31—(Continued)
(Deposition of Sam Gassman.)

Mr. Erskine: Well, now, that is objectionable also.

Mr. Lasky: What is the objection?

Mr. Erskine: As leading and suggestive.

Mr. Lasky: All right. I will reframe it again.

Mr. Erskine: I do not want to put any obstacle in your path. Let me see just a moment. Has he not already testified that that account was used for the purposes of the United Produce Company?

Mr. Lasky: Well, that is my construction of what he has testified to. If that is your construction of what [71] he has testified to, I will not pursue it.

Mr. Erskine: I am not stipulating to anything. I am just trying to find out. I do not like this use of terms like "another pocket," and so forth. I do not know what that means.

Mr. Lasky: Well, let me reframe it again, Mr. Erskine.

Mr. Erskine: I do not want to be captious, particularly at the hour of 7:45 p.m.

Mr. Lasky: I will reframe it again, and maybe this time I can bypass your scrutiny.

Q. Was the account maintained in the name of Frank C. Lofendo, at the East Bakersfield Branch of the Bank of America, another account of the United Produce Company?

A. I will answer your question in this way: I will say that it was instrumental in carrying on the business of United Produce Company, and that United Produce Company did utilize the account of

Plaintiff's Exhibit No. 31—(Continued)
(Deposition of Sam Gassman.)

Frank C. Lofendo, to carry on its day-by-day business.

Q. And what was the purpose of the utilization of that account; for what purpose was it utilized?

Mr. Sokol: If he knows.

A. I don't know how to answer that question.

Mr. Lasky: If you know.

Mr. Sokol: I just want to interject this—and it [72] may be a part of the record, or not—that circumstances have made it such that he has learned a great deal more about the machinations of the United Produce Company since he has left their employ, from me.

Mr. Lasky: All right.

Mr. Sokol: Because I have had certain conversations with certain individuals, and in turn, in discussing the case with him, there have been developed certain things which were behind certain things at the time he did them, at someone else's instructions, that, when they were done, were not apparent, that he did not know at the time, but learned subsequent to that time, because of certain things he has been told about it.

Mr. Lasky: I will withdraw the question.

Q. Do you know who Dean Howells was, or is?

A. Do I know who he is?

Q. Yes.

A. I only know who he is from what I have been—from what I have heard.

Q. Well, from whom have you heard that?

Plaintiff's Exhibit No. 31—(Continued)
(Deposition of Sam Gassman.)

A. From Frank Lofendo, and from Mr. Rosenthal, but it was in general conversation, not specifically discussing Dean Howells, but having heard that there was a Dean Howells. However, I have never seen him, and I would not [73] know what he looked like, in a million years.

I have just heard his name.

Q. All right. I want you to tell me what you have been told relative to Dean Howells by Frank C. Lofendo. I am not going to ask you what you have been told by Mr. Rosenthal.

A. Well, I wouldn't say that I was told definitely from Frank Lofendo, that it was told to me directly.

Q. Well, all right, but did you hear it from him?

A. I heard it in the office, as part of conversation that he may have been having with individuals in the office.

Q. But whether he was speaking to you, or to someone else, you heard it from him?

A. Yes, sir.

Q. And what was it he said?

A. All that he said, as far as Dean Howells was concerned, was that Dean Howells was an employee of Mazzie Farms, and anything else about him I don't know.

Mr. Lasky: All right. Well, subject to any suggestion that my associate, Mr. Riordan, may make, I am through. May we consult for a moment?

(A short intermission occurred.)

Plaintiff's Exhibit No. 31—(Continued)

(Deposition of Sam Gassman.)

Mr. Lasky: The direct examination is concluded. I [74] will, however, ask the Reporter to mark the balance of Exhibit 5, which I previously referred to, as Plaintiff's Exhibit 18 for identification.

(The documents referred to were thereupon marked by the Reporter as Plaintiff's Exhibits 18A to 18-BB for identification.)

Mr. Erskine: Off the record.

(There occurred at this point an informal discussion, outside the record, which was not recorded by the Reporter.)

(And Thereupon, the further taking of said deposition was adjourned until Thursday, December 8, A.D. 1949, at the hour of 5:30 o'clock p.m., at the same place.) [75]

Direct Examination
(Continued)

By Mr. Lasky:

Q. Mr. Gassman, I am going to show you a little sheaf of papers, marked on the deposition of Mr. Messenger as Defendant's Exhibits 40-A, 40-B, 40-C, and so forth, and I merely want to ask you to look at those, and tell me whether or not those papers are in your handwriting.

(The witness examined the documents referred to.)

Plaintiff's Exhibit No. 31—(Continued)
(Deposition of Sam Gassman.)

Mr. Lasky: I might say, Mr. Erskine, I had them here the other night, and forgot to refer to them.

A. Yes, they are, with the exception of—

Q. By Mr. Lasky): With the exception of what? A. This one here. (Indicating.)

Q. With the exception of Messenger Exhibit 40-B, the others in the same Exhibit 40 group are in your handwriting; is that correct?

A. That is right.

Mr. Sokol: Please speak up, Mr. Gassman, so that the Reporter can hear you.

The Witness: Yes—they are. [77]

Q. (By Mr. Lasky): Now, Mr. Gassman, last Tuesday evening you testified to sending out checks and deposit slips to Bakersfield, California, enclosed in an envelope of the Bakersfield Inn, addressed to the Bank of America, in turn enclosed in another envelope, addressed to Mr. Dean Howell.

Did you enclose in the outer envelope a slip of paper, with notations on it indicating the date when the inner envelope was to be sent to the Bank of America for deposit?

A. I would like to make one correction in what I said.

Q. Yes.

A. With reference to mailing the first envelopes, I might have incidentally mailed some of them, but of course, that was generally not my task. That was a part of the task of anybody who was taking care

Plaintiff's Exhibit No. 31—(Continued)

(Deposition of Sam Gassman.)

of the mail, so that there would have been another individual who would have actually done the mailing, probably, in 95 to 97 per cent of the cases; and, as an exception, I, as an individual, may have mailed them.

From the point of view of putting a note on, I would say that there were some cases in the beginning where a note was put on, upon instruction from an officer.

Q. Of the United Produce Company?

A. Of the United Produce Company, yes, sir. Later on there was no necessity for it, because they had to go to the bank as soon as they arrived in California.

Q. But in the earlier cases, you did include a note in the outer envelope, with notations as to when the inner envelope was to be sent on to the Bank of America for deposit?

A. Yes sir—that is, I would not say all the time, but there were definitely instances of that sort.

Q. Now, Mr. Gassman, I show you here a group of 42 checks of the United Produce Company, each payable to Frank C. Lofendo, and each having on the back the rubber stamp endorsement "Frank C. Lofendo," and all of them appearing to have cleared through the bank, drawn on the Merchandise National Bank.

Does counsel want to see these?

Mr. Erskine: I might just glance at them, yes. Thank you.

Plaintiff's Exhibit No. 31—(Continued)
(Deposition of Sam Gassman.)

Mr. Lasky: The aggregate amount of these checks being \$763,340.32, I believe.

Mr. Erskine: All right. [79]

Q. (By Mr. Lasky, continuing): Now will you look at these checks, please, Mr. Gassman.

(The witness examined the documents referred to.)

A. Yes, sir, I have looked at them.

Q. Now, in the case of all these checks, bearing the rubber stamp endorsement of Frank C. Lofendo, were those checks prepared, and the rubber stamp placed on the checks, in the manner in which you described with respect to similar checks?

A. Yes, sir.

Q. Now, I call your attention to one check in the group for \$33.62, which has the endorsement "Frank C. Lofendo" on it in writing.

A. I see that.

Q. In handwriting. Do you recall that check?

A. No, sir, I do not; it would make no impression upon me at all.

Q. I see. Can you recognize that as Mr. Lofendo's handwriting? A. Yes, sir, I do.

Q. But in the case of the other checks in the group, the endorsement was put on by the rubber stamp, by someone in the employ of United Produce Company? A. Yes, sir. [80]

Q. And the checks were then forwarded to

Plaintiff's Exhibit No. 31—(Continued)

(Deposition of Sam Gassman.)

Bakersfield, California, in the manner which you have already described? A. Yes, sir.

Mr. Lasky: I have no further questions. I think that these checks should be marked as Plaintiff's Exhibits 19-A, and so forth; and then, Mr. Erskine, I think we would like to withdraw them, and substitute photostatic copies.

Mr. Erskine: All right.

Mr. Lasky: Because there may be occasion to use them elsewhere.

(The checks referred to were thereupon marked by the Reporter as Plaintiff's Exhibits 19-A to 19-PP, both inclusive, for identification.)

* * *

[Endorsed]: Filed June 26, 1950.



PLANNING EXHIBIT No. 32
5-0

No 8434

WE ENCLOSE FOR COLLECTION
ITEM LISTED BELOW

Date	Owners Date & Number	Payer & Documents	Date of Item	Due	Amount
					\$ Int. Total

Special Instructions

NO PROTEST

Deliver documents only on payment unless other-
wise instructed.

If unpaid at maturity please return at once.

Kindly remit in Chicago or New York Exchange.

Return this letter with your remittance.

MERCHANDISE NATIONAL BANK

MERCHANDISE MART

CHICAGO, ILL.

T O

1, [Endorsed]: Filed June 26, 1950, 112.



The Friends Account at Bank of America N. Y. & C. East 13th Street New York
 this showing days on which payments were made against uncollected funds
 into itself, with days on which account had a clear collected balance

Date	<u>Per books</u>		<u>Adjusted for Pre-Paid</u>		125
	Collected Balances	Amount Paid against Uncollected Funds	Collected Balances	Amount Paid against Uncollected Funds	
9-25		115 168 63		115 168 63	
9-27		115 175 -		50 168 63	
9-28	28686 97	84 488 03	28686 97		
9-29		52 249 03	52 286 97		
9-30		52 249 03		52 249 03	
10-1		66 702 03	21 166 97		
10-2		142 609 03		66 702 03	
10-4		186 298 53		60 284 03	
10-5		115 798 53		115 798 53	
10-6		160 798 53		115 798 53	
10-7		48 298 53		13 298 53	
10-8		53 203 73	35 451 47		
10-9		141 885 23	18 676 27		
10-11		141 885 23		141 885 23	
10-13		115 212 73	37 228 -		
10-14		119 921 73		49 180 73	
10-15		200 444 73		119 921 73	
10-16		118 092 23		118 092 23	
10-18		89 922 73		44 922 73	
10-19		170 893 03	69 815 77		
10-21	49 373 37		75 799 77		
10-22		50 118 50	49 373 37		
10-23		91 856 50		50 108 50	
10-25		154 515 50		26 019 50	
10-26		286 531 10		154 515 50	
10-27		316 592 90		286 531 10	
10-28		56 223 23		37 139 83	
10-29		59 353 73		16 842 23	
10-30		286 641 73		16 141 73	
11-1		17 332 73	11 912 77		
11-3		133 239 97	111 934 79		
11-4		133 239 97		133 239 97	
11-5	10 856 63		77 683 13		
11-6		44 058 69	10 856 63		
11-8		10 672 19	16 964 31		
11-10	13 061 17		239 120 17		
11-15		96 507 98	13 061 17		
11-17		82 281 74		6 624 83	

[Endorsed]: Filed June 26, 1950.

PLAINTIFF'S EXHIBIT NO. 34

Form 1242
TREASURY DEPARTMENT
COMPTROLLER OF THE CURRENCY—EXAMINING

THIS REPORT OF EXAMINATION IS STRICTLY CONFIDENTIAL

State whether special or regular examination

REGULAR

This report of examination has been made by an examiner selected or approved by the Comptroller of the Currency for use in the supervision of the bank. This copy of the report is the property of the Comptroller of the Currency and is furnished to the bank examined for its confidential use. Under no circumstances shall the bank, or any of its directors, officers, or employees disclose or make public in any manner the report or any portion thereof. The information contained in this report is based upon the books and records of the bank, upon statements made to the Examiner by directors, officers, and employees, and upon information obtained from other sources believed to be reliable and presumed by the Examiner to be correct. It is desired that each director, in keeping with his responsibilities both to depositors and to stockholders, thoroughly review the report. In making this review, it should be kept in mind that an examination is not the same as an audit, and this report should not be considered to be an audit report.

Name of Examiner **J. F. MARR** No. of Bank **14390** Fed. Res. Dist. No. **7**

EXAMINER'S REPORT OF THE CONDITION OF

The **MERCHANTS NATIONAL BANK OF CHICAGO** **CHICAGO** **COOK** **ILLINOIS**
(City) (County) (State)
Examination commenced at **8:15** o'clock **A. M.**, on **DECEMBER 30, 1948**
Examination closed at **3:00** o'clock **P. M.**, on **JANUARY 12, 1949** (**3 days intervening**)
RAYMOND L. HENNINGER, President. **WALTER J. HENNINGER**, Vice President & Cashier.

Resources	Amount	Liabilities	Amount

LOANS EXCEEDING THE LIMIT PRESCRIBED BY SECTION 5300 OF THE REVISED STATUTES, EXCESSIVE BALANCES WITH NON-MEMBER BANKS UNDER SECTION 10, FEDERAL RESERVE ACT, AND LOANS TO AFFILIATES IN EXCESS SECTION 23A, FEDERAL RESERVE ACT, AS AMENDED.

(Charged-off items, overdrafts, and bank's own acceptances discounted must be included in loans. Also include cash items and enforceable repurchase agreements.)

Name of Borrower	Amount	If loans excessive by reason of reduction in capital or surplus or for any other reason not in violation of law, so state. Otherwise give names of directors who approved these loans as shown by the bank's records, and any other comment deemed appropriate.
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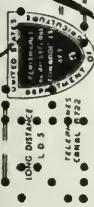
Not so determined.

Endorsed : Filed June 26, 1950.

If excessive loans are numerous, continue the list on Form 1430, to be inserted in the report at this point. Where an excessive loan exists because of accommodation paper, partnership liability, renewed commercial paper, or any unusual reason, state clearly why this line is so classed.

NOTE: The examiner should advise the directors of their individual responsibility, under Section 5319, U. S. R. S., for all loss sustained on excessive or other unlawful loans.

Produce Company



CARLOT FROMA • VEGETABLES • POTATOES • ONIONS

1421 SOUTH ANSEL

PAY UNITED PRODUCE CO. **18426 DOLS 00 CTS** \$ 18426.00

TO THE ORDER OF

FRANK C. LOFENDO
BAKERSFIELD CALIFORNIA
CASE No. 28721-12 PLAINIFF'S EXHIBIT No. 13 for id
IN THE MATTER OF *Overhauser v. B. & A.*
DATE *9/29/49* WITNESS *Overhauser*

UNITED PRODUCE COMPANY

MERCHANDISE NATIONAL BANK
OF CHICAGO
CHICAGO, ILLINOIS

RECEIVERS GROWERS SHIPPERS

By *Overhauser* President

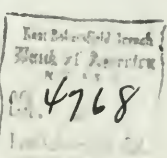
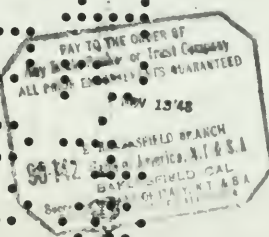
CANCELLED IN ERROR

Overhauser
MERCANDISE NATIONAL BANK - CONTROLLER

Plf's 13 id

THIS CHECK IS HEREBY ACCEPTED IN FULL PAYMENT AND SETTLEMENT OF ANY AND ALL CLAIMS REPRESENTED BY OR ARISING FROM THE SUBJECT MATTER APPEARING ON THE STATEMENT OF SETTLEMENT ATTACHED.

FRANK C. LOFENDO



91000

United Produce Company
100 DISTANCE
D. I.
TELEPHONES
CANAL 9722



CARLOT FRUITS • VEGETABLES • POTATOES • ONIONS

1421 SOUTH ALABAMA CHICAGO, 4, ILL.

NOVEMBER 8, 1948

\$ 15665.00

PAY TO THE ORDER OF
UNITED PRODUCE CO
\$ 15665 DOLS 00 CT

CASE No. 287258 PLAINIFF'S EXHIBIT No. 14 for it
IN THE MATTER OF Merchandise
Bakersfield California DATE 9/29/49 WITNESS *Contra* *Pro*

FRANK C. LOFENDO
BAKERSFIELD CALIFORNIA

UNITED PRODUCE COMPANY
By *Frank C. Lofendo*
President

MERCHANDISE NATIONAL BANK
OF CHICAGO
CHICAGO, ILLINOIS

RECEIVERS

GROWERS

SHIPPERS

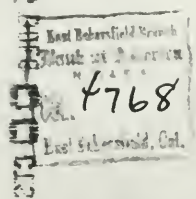
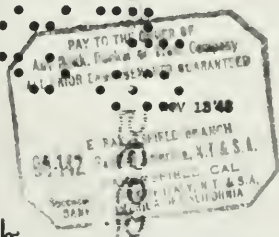
118

CANCELLED IN ERROR

Deven
MERCHANDISE NATIONAL BANK - COMPTROLLER

THIS CHECK IS HEREBY ACCEPTED IN FULL PAYMENT AND SETTLEMENT OF ANY AND ALL CLAIMS REPRESENTED BY OR ARISING FROM THE SUBJECT MATTER APPEARING ON THE STATEMENT OF SETTLEMENT ATTACHED.

FRANK C. LOFENDO



Plb's 14 id

Ref's 15 id

Produce Company

UNITED STATES DEPARTMENT OF AGRICULTURE
LONG DISTANCE
L.O. 5-5
TELEPHONE
CANAL 8722

CARLOT FRUITS • VEGETABLES • POTATOES • ONIONS

CHICAGO, ILL. November 8, 1948

1421 SOUTH LAVERGNE ST.

PAY

UNITED PRODUCE CO. **\$2692 DOLS 50 CTS**

\$ 22692.50

FRANK C. LOEFFENDO
BAKERSFIELD CALIFORNIA.

PLAINTIFF'S EXHIBIT No. 16 - *bound*
DEFENDANT'S *Q-16*
CASE No. *28721-R* IN THE MATTER OF *Overton v. Loeffendo*
WITNESS *9/28/49*

MERCHANDISE NATIONAL BANK

OF CHICAGO
CHICAGO, ILLINOIS

RECEIVERS

UNITED PRODUCE COMPANY

By President

SHIPPERS

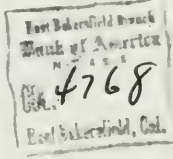
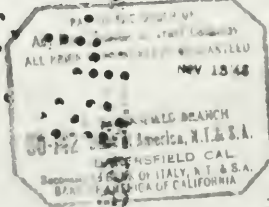
GROWERS

CANCELLED IN ERROR

Frank C. Loeffendo
MERCHANDISE NATIONAL BANK - CONTROLLER

THIS CHECK IS HEREBY ACCEPTED IN FULL PAYMENT AND SETTLEMENT OF ANY AND ALL CLAIMS REPRESENTED BY OR ARISING FROM THE SUBJECT MATTER APPEARING ON THE STATEMENT OF SETTLEMENT ATTACHED.

FRANK C. LOEFFENDO



Ref's 16 id

1256

TO

69019

MERCHANDISE NATIONAL BANK
CHICAGO, ILLINOIS.

DATE NOVEMBER 13, 1940
SENT

DD	NO.	UD
In reporting our collection number, please include letter prefix.		

E. BAKERSFIELD. Branch

Item as described below is enclosed herewith for collection. PLEASE MAKE SEPARATE REMITTANCE OR CREDIT FOR THIS COLLECTION AS INDICATED BELOW. MENTION THIS COLLECTION NUMBER AND NAME OF THIS BRANCH.

Bank of America
NATIONAL TRUST AND SAVINGS ASSOCIATION
BAKERSFIELD CALIF

PAID
NOV 15 1940
OF CHICAGO ILL
MERCHANTS NATIONAL BANK

SPECIAL INSTRUCTIONS

CASE No 28721-12 EXHIBIT No. 20 - *Barra*
IN THE MATTER OF *Overland v. Barra*
DATE 9/29/49 - WITNESS *Overland*

INSTRUCTIONS

Must be paid not later than
Allow discount as follows *NONE*
Deliver documents only on *PAYMENT*
Advise non-payment by *MAIL*

ENDORSER

FRANK C. LOFENDO
BAKERSFIELD INN
BAKERSFIELD, CALIF.

DRAWEE:

UNITED PRODUCE CO.

DOCUMENTS

6 drafts.

AMOUNT
\$18,426.00
15,665.00
17,976.00
22,692.00
18,426.00

DISPOSITION OF PROCEEDS

Please dispose of proceeds as indicated by letter *K* below.
"K" Credit Bank of America National Trust and Savings Association with advice to this branch.

"L" Remit in _____ funds

To _____ for credit of Bank of America National Trust and Savings Association with advice to this branch.

"M" Remit in _____ funds to this branch.
"N" Credit "Branch Clearings" and send entry letter to this branch.

Please acknowledge receipt of this collection to this branch of the

Bank of America
NATIONAL TRUST AND SAVINGS ASSOCIATION

113,216.50

1203

[Endorsed]: Filed June 19, 1950.

Date	Owners	Documents	Date of Item	Due	Amount
11-12-48	A O W V T N I O E C E	Check - signed by United Produce Co. payable to Frank W. - ofendo 419-4765	11-6-48	Demand	\$ 22,367.50
		Bank of America NT and SA Bakersfield, California	Special Instructions NO PROTEST PLEASE ADVISE BY AIR MAIL NOV 10 1948 MERCHANTS NATIONAL BANK OF CHICAGO		Total
					Coll. Fee
					Total

☐ We enclose our check in payment.
☒ We credit your account with total shown above.
☐ We return the above described item unpaid.

Reason _____

MERCHANTISE NATIONAL BANK
 CHICAGO, ILLINOIS

MERCHANTISE NATIONAL BANK
 CHICAGO, ILLINOIS

Nº 69579

Date	Owners	Documents	Date of Item	Due	Amount
11-12-48	A O W V T N I O E C E	Check - signed by United Produce Co. payable to Frank W. - ofendo 419-4765	11-6-48	Demand	\$ 19,053.60
		Bank of America NT and SA Bakersfield, California	Special Instructions NO PROTEST PLEASE ADVISE BY AIR MAIL NOV 10 1948 MERCHANTS NATIONAL BANK OF CHICAGO		Total
					Coll. Fee
					Total

☐ We enclose our check in payment.
☒ We credit your account with total shown above.
☐ We return the above described item unpaid.

Reason _____

MERCHANTISE NATIONAL BANK
 CHICAGO, ILLINOIS

1258

Date	Owners	Documents	Date of Item	Due	Amount
11-12-48	ADVTN CO O W T N E R	Check - signed by United Produce Co, payable to Frank G. Lofendo 419-4763 BANK OF AMERICA NT AND SA BAKERSFIELD, CALIFORNIA	11-6-48 Demand		\$ 28,037.50 Total
Special Instructions PAID REMITTANCE BY AIR MAIL NOV 12 1948 MERCHANDISE NATIONAL BANK OF CHICAGO					Coll. Fee Total

☒ We enclose our check in payment.
☐ We credit your account with total shown above.
☐ We return the above described item unpaid.
 Reason

MERCHANDISE NATIONAL BANK
 CHICAGO, ILLINOIS

No 69578

MERCHANDISE NATIONAL BANK
 CHICAGO, ILLINOIS

Date	Owners	Documents	Date of Item	Due	Amount
11-12-48	ADVTN CO O W T N E R	Check - signed by United Produce Co, payable to Frank G. Lofendo 419-4763 BANK OF AMERICA NT and SA BAKERSFIELD, CALIFORNIA	11-6-48 Demand		\$ 19,854.50 Total
Special Instructions PAID REMITTANCE BY AIR MAIL NOV 12 1948 MERCHANDISE NATIONAL BANK OF CHICAGO					Coll. Fee Total

☒ We enclose our check in payment.
☐ We credit your account with total shown above.
☐ We return the above described item unpaid.
 Reason

MERCHANDISE NATIONAL BANK
 CHICAGO, ILLINOIS

DEFENDANT'S EXHIBIT O

Western Union

[Telegram]

OA122

O.CB113 56 2 Extra Collect—WV Chicago, Ill., 20 1023A—I. N. Tarr, Assistant Cashier, Bank of America—432x108—East Bakersfield Branch, Bakersfield, Calif—

Answering Wire Re: United Produce We Loan Them Legal Limit on Secured Basis. Net Worth of Company Over Eighty Thousand Dollars. Impossible for Us to Set Limit on Acceptance of Their Checks Up to Present Have Never Returned Any Checks. Suggest You Contact Your Main Branch at Fresno, California, Who Have Complete Information.

MERCHANDISE NAT'L BANK
OF CHICAGO,

J. H. REICHWEIN,
Vice-President.

[Endorsed]: Filed June 20, 1950.

DEFENDANT'S EXHIBIT Q

Merchandise National Bank
of Chicago
Merchandise Mart
Chicago 54

September 22, 1948.

Bank of America,
Fresno Main,
Fresno, California.

Gentlemen:

In reply to your telegram of September 21, we wired you as follows:

“Refer wire date. Checks in amount mentioned good at this time. U. P. Company well and favorably known to us. Extend loans in six figures under special arrangements. Writing.”

We are pleased to advise that we have had a very satisfactory account from United Produce Company, 1421 South Aberdeen Street, this city, since September, 1945, it being their practice to maintain balances averaging in satisfactory five-figure proportions. We hold at their disposal a line of credit to the extent of our legal loaning limit of \$200,000, under special arrangements, and find that they make proper use of this commitment. In addition to the foregoing line, we also discount customers' drafts for them to the extent of \$250,000 and our experience in connection with same has been favorable. The latest financial figures we have seen from the company is for their fiscal year ended

June 30, 1948, at which time they reported a net worth in the amount of \$82,000 in addition to \$25,000 which was advanced to the company by the principals. The company is making progress from the standpoint of operations.

In our dealings with them we have come to entertain a favorable regard for the account in this quarter, which is best evidenced by the support we extend.

Very truly yours,

/s/ F. W. RUDOLPH,

Assistant Vice President.

[Stamped]: Received Sep. 24, 1948. Fresno Main Office, Bank of America N. T. & S. A.

[Stamped]: Confidential! For your private use, and without responsibility on the part of this Bank or its Officers.

FWRudolph: VD

Air Mail

[In Margin]: Jacks Fruit Co.

Jack Oddo

Received September 24, 1948.

[Endorsed]: Filed June 20, 1950.

DEFENDANT'S EXHIBIT NN

Stipulation

Commercial Account Ledger

Defendant's exhibit HH hereby placed in evidence, are copies of the commercial ledger sheets for the period from October 30th to and including November 27, 1948, of United Produce Co. on the books of Merchandise National Bank.

* * *

The term "apparent noon day balance" as used in this stipulation, relative to the commercial ledger sheet, is used to mean the balance as it physically appears on the face of the sheet and is without prejudice to the contention of any party that the balance was or was not an actual noon day balance.

Note Liability Ledger

Defendant's Exhibit II hereby placed in evidence is a copy of a sheet of the note liability ledger of United Produce Co. with Merchandise National Bank covering the period from October 25, 1948, to December 6th, 1948.

The column headed "credits" on the note liability ledger shows entries as of November 5, 1948, aggregating \$1,325,054.84. Said amount of \$1,325,054.84 is the sum total of the face amount of a note for \$200,000.00 executed by United Produce Co. to Merchandise National Bank under date of October 5, 1948, plus all other notes executed by United Produce Co. to Merchandise National Bank during the

Defendant's Exhibit NN—(Continued)

month of October, 1948. All the notes executed by United Produce Co. to Merchandise during the months of October and November were in the form of a note introduced in evidence and marked "Plaintiff's Exhibit 5" and the maturity dates of all the notes executed by United Produce Co. to Merchandise during the month of October, 1948, specified a maturity date of November 5, 1948.

The note liability ledger contains a column headed "debits," and there is entered in this column as of November 1st, \$57,870.32; as of November 3rd, \$60,457.24 and \$70,628.40; as of November 4th, \$42,829.26 and as of November 5th, \$108,581.58 and \$200,000.00. All of the last mentioned items are the face amounts of notes in said form executed by United Produce Co. to Merchandise National Bank during the period from November 1st to and including November 5th, 1948, and specified a maturity date of December 3, 1948.

Under the column headed "assigned accounts" on the note liability ledger there is an entry under November 5, 1948, of \$540,366.80. This amount of \$540,366.80 is the aggregate amount of said notes executed by United Produce Co. to Merchandise National Bank during the period from November 1st to and including November 5th, 1948.

The entries made in the column headed "debits" in the note liability ledger during the period from November 6th to November 16, 1948, are the amounts of notes executed by United Produce Co. to Merchandise National Bank during that period;

Defendant's Exhibit NN—(Continued)

and each such note specified a maturity date of December 3, 1948; and each of the amounts entered in the column headed "assigned accounts" in the note liability ledger under said figure of \$540,366.80 is the total in dollar face amount of the notes of United Produce Co. to Merchandise National Bank as of the date of such entry. To illustrate what is stated in the next preceding sentence, the figure \$1,287,064.70 entered in the column headed "assigned accounts" on the note liability ledger, represents the total face amount of notes executed by United Produce Co. to Merchandise National Bank from November 1 to November 16, 1948. All of the notes executed by United Produce Co. to Merchandise National Bank during the month of November, 1948, specify as the date of their maturity December 3, 1948, and all of said notes, as previously stated, were in the form of said note already introduced in evidence and marked Plaintiff's Exhibit 5.

The amounts of all notes executed by the United Produce Co. to the Merchandise National Bank were credited upon the dates of the notes on the commercial ledger sheet of the United Produce Co. and the amounts were prefixed with the letters "CC" to distinguish such credits from deposits made by the company. All credits on United Produce Company's Commercial ledger sheet on plaintiff's books which composed the apparent noon day credit balance thereon at the close of business on November 13th, 1948, came from Merchandise National Bank loan department, except \$8,500 which

Defendant's Exhibit NN—(Continued)

was based on a deposit of a check never collected. The remainder of the apparent noon day credit balance on said ledger sheet at the close of business on November 13, 1948, after the deduction from said balance of \$8,500.00, was composed of about 90% of credits coming from loan operations secured by alleged accounts receivable assigned by United Produce Company and other security and about 10% of credits coming from discount of drafts for United Produce Company. A copy of the credit ticket used on November 1, 1948, for crediting said \$57,870.32 on the commercial ledger sheet is hereby placed in evidence as defendant's Exhibit JJ as illustrative of the practice followed on all such transactions.

Assigned Accounts Receivable Ledger

Defendant's Exhibit HH, hereby placed in evidence, are copies of ledger pages of the assigned accounts receivable ledger of United Produce with Merchandise National Bank covering the period from October 28 to December 6, 1948.

The figures entered in the sub-column headed "balance" in the column headed "payment account" represent aggregate remittances, as of each day shown, received by Merchandise National Bank **from debtors from the first of the month** purportally owing United Produce Co. assigned accounts receivable. Whenever the word remittances is used in this stipulation, it shall mean remittances represented by such debtors' checks endorsed and de-

Defendant's Exhibit NN—(Continued)

livered by United Produce Company to Merchandise National Bank, whether such remittances have or have not been collected.

In the sub-column headed "payments" in the payment account column are entered the total of remittances from debtors delivered to Merchandise National Bank by United Produce Co. as of the dates shown and as listed on the respective remittance sheets. For example, such ledger shows that as of November 1, 1948, Merchandise National Bank received from United Produce Co. remittances in the form of checks of debtors payable to United Produce and endorsed by it, aggregating \$57,870.32. And, as subsequently shown, as the daily totals of remittances received were entered each day in the payments column, the amount entered in the balance column was increased by the amount of such daily total.

The figure appearing in the sub-column headed "transfers" as of November 5, 1948, of \$1,325,054.84 was \$200,000.00 plus the aggregate of remittances in the payment account as of that date which were entered in the column headed credits on the note liability ledger and at the same time notes of United Produce Co. held by Merchandise National Bank in the same amount were surrendered to United Produce Co. The sum of \$1,325,054.84 includes the \$1,125,054.84 shown in the column headed "balance" as of October 30, 1948, plus the amount of a note for \$200,000.00 dated November 5, 1948, whereupon a note by United Produce

Defendant's Exhibit NN—(Continued)

Co. to Merchandise executed October 5, 1948 was retired. The remaining aggregate of \$340,366.80 appearing in the balance sub-column of the payment account column as of the close of business on November 5, 1948, represents said remittance delivered to the bank during the period from November 1st to and including November 5, 1948.

And so the entries made in the payment account as of November 5, 1948, show that on that date the note of United Produce Co. to Merchandise National Bank dated October 5th and maturing on November 5, 1948, for \$200,000.00 was retired and that all of the other notes executed by United Produce Co. to Merchandise during the month of October, 1948, were also retired by the transfer and application from the payment account of said sum of \$1,325,054.84 and that said remittances delivered to Merchandise National Bank from November 1st to and including November 5th aggregated \$340,366.80.

A comparison of the daily totals aggregating said figure of \$340,366.80 entered in the "balance" sub-column of the "payment account column" as of November 5, 1948, with the daily totals aggregating the figure of \$540,366.80 entered in the column headed "assigned accounts" in the note liability ledger as of such date, shows that the difference represents a new note for \$200,000 entered in the note liability ledger on November 5, 1948; and a comparison of the figure as of any particular date after November 5, 1948, entered in said "balance"

Defendant's Exhibit NN—(Continued)

sub-column with the figure entered in the column headed "assigned accounts" in the note liability ledger, will show the same difference of \$200,000.00. Nothing on the note liability ledger sheet reveals or reflects the unpaid balance of United Produce Company's notes held by plaintiff at any time; but in order to ascertain that balance so far as it is shown by any ledger sheet, recourse must be had to United Produce Company's "Assigned Accounts Ledger" sheet on plaintiff's books.

On the Assigned Accounts Ledger sheet in the sub-column headed "balance," in the column headed "Notes payable," appear figures, day by day, showing the balance of the notes after giving effect on the day of remittance to checks to United Produce Company endorsed and remitted by United Produce Company to plaintiff, whether such remittances had or had not yet been collected. As previously stated, on the same sheet, in the sub-column headed "payments," in the column entitled "Payment Account," appear, each day as such checks were remitted by United Produce Company, the total face amount thereof, whether or not they were yet collected.

The amounts of the checks constituting plaintiff's Exhibit 4 for Identification were listed in this column on this sheet on the respective day they were received by plaintiff from United Produce Company, and effect thereto was given at the same time in the "balance" sub-column of the "Notes Payable" column.

Defendant's Exhibit NN—(Continued)

In the sub-column headed "Loans Made" appear the amounts of new notes executed on the dates shown.

The remaining or left hand column on the assigned accounts receivable ledger entitled "collateral account" shows the following: the sub-column headed "additions" shows the daily totals of new assignments on the dates shown of accounts receivable; the amounts in the "withdrawals" sub-column show the elimination of accounts receivable for which remittances have been received or for which drafts have either been paid or recalled.

Also hereby placed in evidence and marked defendant's exhibit LL is the interim assignment of November 1st. Said interim assignment is typical of the other interim assignments executed by United Produce Co. to Merchandise National Bank. The total amount of this assignment of \$147,742.23 was entered on November 1, 1948, under the sub-column headed "additions" in the collateral account column of the assigned accounts receivable ledger. Similar practice was followed for other assignments.

The remittance sheet of November 8, which is one of the remittance sheets already in evidence, shows remittances on that date and payments on account of drafts of \$99,639.75. This amount was entered on November 8, 1948, under the sub-column headed "withdrawals" in said collateral account column. The total of \$84,787.69 of the checks listed on this remittance sheet and delivered to the Mer-

Defendant's Exhibit NN—(Continued)

chandise National Bank with it as shown thereon was entered as of November 8, 1948, on the Assigned Accounts Receivable ledger under the sub-column "payments" in the "payment account" column and under the sub-column "payments" in the "Notes Payable" column.

The \$14,852.06 appearing on the remittance sheet represents the withdrawal from the assigned accounts receivable of drafts which had either been paid or recalled as shown in the drafts discounted ledger.

Under the arrangement between Merchandise National Bank and United Produce Co. every account receivable as it came into existence was to be assigned to Merchandise National Bank.

Whenever a check, the amount of which had been entered in the "payment account" sub-column on the Assigned Account ledger sheet was returned to plaintiff uncollected, or whenever a discounted draft the amount of which had been entered on the Drafts Discounted Ledger sheet was withdrawn by United Produce Company or returned unpaid by the drawee, the amount of the check or draft was charged back by a debit entry on the commercial ledger sheet. This was the plaintiff's practice in the case of United Produce Company and other customers having loan operations of a similar nature.

Draft Discount Ledger

Defendant's Exhibit MM hereby placed in evidence, are copies of the draft discount ledger sheets

Defendant's Exhibit NN—(Continued)

for the period from November 10th to November 18, 1948, inclusive, of United Produce Company on the books of Merchandise National Bank.

The use of this ledger can be explained by considering the first page, the page marked 24DDDD. In the third column from the left, under the heading "Memorandum-Endorser or Maker" appear two columns of figures, one a broken column and the other an unbroken column. Both columns of figures give the numbers of drafts assigned to the drafts discounted by Merchandise National Bank for United Produce Co. The broken column which begins with the figure 1563 gives the numbers of the drafts discounted, whereas the unbroken column, beginning with the figure 1327, gives the numbers of the drafts paid or recalled. The date November 10, 1948, in the column headed "Date" is the date of the transaction on the same line as the date and the date of the transactions below this line until there is reached the next date in the same column.

In the column headed "Debits" on this first page appear the amounts credited to United Produce Co. on account of drafts discounted for it. In the column headed "Credits" appear four dates above the column of figures. Each of these dates refers to the figure immediately to its left in the debits column and is the date on which the draft referred to in such column was either paid or recalled.

The column of figures in this "Credits" column beginning with the figure \$1239.44 are the amounts

Defendant's Exhibit NN—(Continued)

of the drafts previously discounted which have been paid or recalled.

The other dates appearing on this first sheet in the column headed "Credits" indicates the same thing as the dates at the top of the column.

The figure \$5933.42 in the column headed "Direct" is an entry of a debit which is the total of figures on this and the next preceding sheet in the column headed "Debits" and below the figure of \$5933.42 in the column headed "Direct" appears the figure \$23,442.28. This is a credit entry which is the total of the credits for that day, November 10, 1948, which credits are in the column headed "Credits" and commence with the figure \$1239.44.

The figure \$249,915.66 in the column headed "Total Liabilities" shows the total amount of discounted drafts of United Produce Co. outstanding and unpaid as of the close of business on November 9, 1948.

These entries on the first sheet of this Exhibit are typical of the entries on its other sheets.

The amounts of all drafts discounted by the Merchandise National Bank for United Produce Co. were credited upon the dates on which the drafts were discounted on the commercial ledger sheet of United Produce Co. and the amounts were prefixed with the letters "CC" to distinguish those credits from deposits made by the company.

Of the outstanding drafts discounted on the basis of which credits were entered in United Produce

Defendant's Exhibit NN—(Continued)

Co.'s commercial ledger on or before November 15, 1948, drafts in the amount of \$117,779.31 were never collected.

On the defendant's exhibit MM none of the title has any significance except as explained in this stipulation.

[Endorsed]: Filed June 24, 1950.

No. 13,039

United States Court of Appeals
For the Ninth Circuit

BANK OF AMERICA NATIONAL TRUST
AND SAVINGS ASSOCIATION, a na-
tional banking association, and
EUGENE J. O'RILEY, as Trustee in
Bankruptcy of the Estate of United
Produce Company, a corporation,
Bankrupt,

Appellants,

vs.

MERCHANDISE NATIONAL BANK OF CHI-
CAGO, a national banking association,

Appellee.

BRIEF FOR APPELLANTS.

S. B. STEWART, JR.,

G. D. SCHILLING,

300 Montgomery Street, San Francisco 4, California,

MORSE ERSKINE,

ERSKINE, ERSKINE & TULLEY,

625 Market Street, San Francisco 4, California,

Attorneys for Appellants.

FILED

DEC 11 1951

Subject Index

	Page
I. Statement of pleadings and jurisdictional facts.....	1
A. Statement of pleadings	2
B. Statement of jurisdictional facts	5
II. Statement of the case	5
III. Specifications of error relied upon by Bank of America	11
IV. Argument	14
A. The six and four checks were paid, and the trial court's finding to the contrary is erroneous.....	14
1. The relevant facts	14
2. Under the law the checks were paid	17
3. There were good balances to United's ac- count when the checks were debited against the account	22
B. Upon Merchandise's payment of the checks the agency of both Bank of America and Merchandise for their collection terminated, and Merchandise thereupon became indebted to Bank of America and Bank of America to Lofendo in the amounts of the checks	29
C. Statement of relevant facts relating to Lofendo account	39
D. Bank of America had a lien upon the proceeds of the four and six checks and therefore Merchandise is precluded from recovering its payments of the checks	45
E. Merchandise cannot recover from Bank of America its payment of the four and six checks because it received a substantial benefit from their pay- ment	54
F. Bank of America's position was changed by rea- son of Merchandise's payment of the four checks and therefore it became a bona fide purchaser of their payment	56

	Page
G. Bank of America's position was changed by reason of Merchandise's payment of the six checks and therefore it became a bona fide purchaser of their payment	69
H. Merchandise knew or should have known of the kite and is therefore precluded from recovering the payments	72
1. The trial court's failure to find with respect to the issue whether Merchandise knew or should have known of the kite	72
2. The evidence shows without conflict that Merchandise knew or should have known of the kite	74
3. Bank of America was not negligent in not having discovered the kite; and Merchandise falsely represented to Bank of America United's condition in order to induce Bank of America to continue to pay Lofendo checks	89
(a) What took place in the Branch prior to its receipt of Reichwein's wire of October 20th	90
(b) Reichwein's wire of October 20th; the wire made representations to Bank of America which were fraudulent	93
(c) What took place in the Branch after receipt of Reichwein's wire of October 20th. Bank of America relied on this wire	95
4. Regardless of whether or not Bank of America was negligent in not having discovered the kite, the fact that Merchandise knew of the kite, prevents its recovery. And so the issue whether Merchandise had such knowledge, was material	102
5. A summing up of the discussion under this heading H to this point	106
6. As Merchandise knew or should have known of the kite, it will be liable to Bank of America under defendant's counter-claim in the event	

	Page
it is held that Merchandise is entitled to re- cover in this action. And so the issue whether Merchandise had such knowledge was material	107
I. The trial court's finding that Bank of America entered into a contract that it would not act upon the advice of credit with respect to the six checks when received is not supported by the evidence; but such agreement, if made, was void and un- enforceable	108
1. These findings are not supported by the evi- dence	108
2. Assuming a contract, it was invalid because not supported by a consideration	117
3. Assuming a contract, it was invalid because based on mistake	118
4. Assuming a contract, it was invalid because induced by Merchandise's fraud.....	121
5. Conclusion with respect to this point	123
J. Recapitulation	123

Table of Authorities Cited

Cases	Pages
American Exchange National Bank v. Gregg, 138 Ill. 596, 28 N.E. 839	20, 63
American Trust Co. v. California Western States Life In- surance Company, 15 C. (2d) 42, 98 P. (2d) 497.....	122
Bank of America v. Universal Finance Co., 131 Cal. App. 116, 21 P. (2d) 147	105
Briviesea v. Coronado, 19 C. (2d) 244, 120 P. (2d) 649....	63
Broad Street National Bank of Trenton v. Collier, 112 N.J.L. 41, 169 Atl. 552	111
Bromberg v. Bank of America, 58 C.A. (2d) 1, 135 P. (2d) 689	46
Cafritz v. Koslow, Ct. App. D.C., 167 F. (2d) 749.....	72
Citizens State Bank v. Western Union Telegraph Co., (5 Cir.), 172 F. (2d) 950.....	104
Davis v. First National Bank of Fresno, 118 Cal. 600, 50 Fed. 666	29
Dean Tobacco Warehouse Co. v. American National Bank, 123 Tenn. 365, 117 S.W. (2d) 746	33
Dearborn National Casualty Co. v. Consumers Petroleum Co. (7 Cir.), 164 F. (2d) 332	72
Erie Railroad v. Tompkins, 304 U.S. 64, 58 S.Ct. 817.....	17
First National Bank of Corsicana v. Cameron & Co., 149 S.W. (2d) 132	34
First National Bank v. Noble, 179 Ore. 26, 168 P. (2d) 354	21
First National Bank of Richmond v. Davis, 114 N.C. 343, 19 S.E. 280	33
Gillis v. Gillette (9 Cir.), 177 F. (2d) 7	72
Gillette v. Williamsville State Bank, 310 Ill. App. 395, 34 N.E. (2d) 552	20
Goggin v. Bank of America, 183 F. (2d) 322.....	46, 47
Gonsalves v. Bank of America, 16 C. (2d) 169, 105 P. (2d) 118	48

TABLE OF AUTHORITIES CITED

v

	Pages
Hallenbeck v. Leimart, 295 U.S. 166, 55 S.Ct. 685.....	21
Hannah v. Steinman, 159 Cal. 142, 112 Pac. 1094.....	121
Hay v. First National Bank of Springfield, 244 Ill. App. 286	20
Hayes v. Tootle-Lacy Bank (10 Cir.), 72 F. (2d) 429.....	21
Hecker-Jones-Jewell Milling Co. v. Cosmopolitan Trust Co., 242 Mass. 181, 136 N.E. 333	30
Hekler v. Ward (D.C. E.D. Penn.), 21 F. Supp. 710.....	34
Hutchinson v. Hutchinson, 48 C.A. (2d) 12, 119 P. (2d) 214	18
Hilliard v. Bank of America, 102 C.A. (2d) 730, 228 P. (2d) 327	53
Kane v. First National Bank (5 Cir.), 56 F. (2d) 534.....	46, 47
Klaxon Co. v. Stentor Electric Mfg. Co., 313 U.S. 487, 61 S.Ct. 1020	18
Maget v. Bartlett Bros. Land and Loan Co., 226 Mo. App. 416, 41 S.W. (2d) 849	33
Marlborough Corporation v. United States (9 Cir.), 172 F. (2d) 787	72
Monarch Brewing Co. v. George J. Meyer Mfg. Co. (9 Cir.), 130 F. (2d) 582.....	18
Nicholetti v. Bank of Los Banos, 190 Cal. 637, 214 Pac. 51	29
Nineteenth Ward Bank v. First National Bank, 184 Mass. 49, 67 N.E. 670	21, 64
O. B. Avery Co. v. Highway Commissioner of Road District, 363 Ill. 279, 2 N.E. (2d) 77	20
Oregon Iron & Steel Co. v. Kelso State Bank, 129 Wash. 109, 224 Pac. 569	21
People v. Larue, 28 C.A. (2d) 748, 83 P. (2d) 725.....	71
People ex rel. Nelson v. Sheridan Trust and Savings Bank, 358 Ill. 290, 193 N.E. 186	34
People v. People's Bank of Rockford, 353 Ill. 479, 187 N.E. 522	31, 32
Rickey v. New York State National Bank (D.C. N.D. N.Y.), 7 Fed. Supp. 29, affirmed 70 F. (2d) 1020 (2d Cir.)....	33, 38

	Pages
San Francisco National Bank v. American National Bank, 5 Cal. App. 408, 90 Pac. 558	29
Security National Bank v. Old National Bank (8 Cir.), 241 Fed. 1	21
Speck v. Wylie, 1 C. (2d) 625, 36 P. (2d) 618.....	53
Spokane and Eastern Trust Co. v. Huff, 63 Wash. 225, 115 Pac. 80	21
State v. Day, 76 C.A. (2d) 536, 173 P. (2d) 399.....	107
Storing v. First National Bank (8 Cir.), 28 F. (2d) 587..	33, 38
Swasey v. de L'Etanche, 17 C.A. (2d) 713, 62 P. (2d) 753	107
United States v. First National Bank (10 Cir.), 124 F. (2d) 484	106
Weiner v. Roof, 19 C. (2d) 748, 122 P. (2d) 896.....	
.....	57, 60, 64, 65, 67, 68, 72

Statutes

Civil Code:

Sections 1567, 1568, 1577 and 1689	120
Section 1572	95
Sections 1605 and 1550	148
Section 1646	18
Section 1710	122
Section 3108	50, 153
California Bank Act, Section 16c (Act 652 of Deering's California laws)	19, 21, 29
Illinois Negotiable Instruments Act, Section 207a (Rev. Stat. Ill., 1947, ch. 98, Sec. 207a, Illinois Laws of 1943, Vol. 1, page 949	17, 18, 19, 20, 21
28 U.S.C., Section 1291	5
28 U.S.C., Section 1348	5

Texts

18 Am. Jur. 335-336	106
1 Cal. Jur. 143-144, Section 4	37
6 Cal. Jur. 164-167, Sections 114 and 115	118

	Pages
9 C.J.S. Section 214, p. 463	18
9 C.J.S. 472-475	29
9 C.J.S. 482-484, Sections 228b and 230a	30
9 C.J.S. 497	33
9 C.J.S. 502	21
9 C.J.S. 508-510, Section 248b	32
17 C.J.S. 387-388	111
17 C.J.S. 1220-1222	118
37 C.J.S. 287	98
70 C.J.S. 368	54
70 C.J.S. 369, Section 157(b)	102
70 C.J.S. 372	67
Restatement of the Law of Restitution:	
Section 6	102
Section 13, Comment a	52
Section 14, page 55	51
Section 14, pages 57-58	52
Section 33	50
Section 142	106
Section 142, pages 567, 568-569 and 573-574.....	103
8 Zollman, Banks and Banking (perm. ed.), Section 5603, page 361, and Section 5691, page 455	18

Rules

Federal Rules of Civil Procedure, Rule 73	5
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United States Court of Appeals

For the Ninth Circuit

BANK OF AMERICA NATIONAL TRUST
AND SAVINGS ASSOCIATION, a na-
tional banking association, and
EUGENE J. O'RILEY, as Trustee in
Bankruptcy of the Estate of United
Produce Company, a corporation,
Bankrupt,

Appellants,

vs.

MERCHANDISE NATIONAL BANK OF CHI-
CAGO, a national banking association,

Appellee.

BRIEF FOR APPELLANTS.

I. STATEMENT OF PLEADINGS AND JURISDICTIONAL FACTS.

This appeal is from a judgment that plaintiff, hereinafter called "Merchandise", recover of defendant, hereinafter called "Bank of America", payments made by Merchandise to Bank of America aggregating \$205,117.10, with interest.¹

¹If it be held that Merchandise is not entitled to recover these payments, there will be a credit balance of \$30,934.76 in the Lofendo

A. Statement of pleadings.

Merchandise's complaint alleges that on November 23, 1948, there was a credit balance of \$386,283.07 in a deposit account carried by Merchandise with Bank of America; that Bank of America paid Merchandise \$183,235.47 of this balance, but refused to pay Merchandise the balance of \$203,047.60; and that Bank of America owes Merchandise this balance with interest (I, 61-62).²

This amount of \$203,047.60 is the aggregate of two sums, one for \$89,813.10, represented by checks to which we will refer as "the four checks"; the other for \$113,216.50, represented by checks to which we will refer as "the six checks".

Merchandise by its original complaint sought only to recover the amount of the six checks; but at the end of the trial the trial court granted Merchandise leave to file its amended complaint by which it seeks to recover the aggregate of the four and six checks.

Bank of America's amended answer to Merchandise's original complaint denied that Bank of America owed Merchandise any sum and alleged that Bank of America paid to Merchandise the entire balance

account which Bank of America shall owe the one held entitled to it: whereas if the judgment is affirmed, there will be no credit balance in the account; and so if the judgment is affirmed Bank of America's loss will be \$205,117.10, less \$30,924.76, or \$174,192.34, plus the interest allowed Merchandise by the judgment.

²In citing the record, we will not use the abbreviation "R" to designate the record. Of course, the Roman numerals in the citations of the record refer to the volume, the arabic numbers to the page.

to Merchandise's credit in its deposit account with Bank of America (I, 27-30).

The amended answer alleges by way of separate defense and counterclaim that for five months prior to November 15, 1948, United Produce Company, hereinafter referred to as "United", a Chicago commission merchant, and its agent, Lofendo, were engaged in what is known in banking as a "kite";³ that one end of the kite was Merchandise's office in Chicago and the other end the office of the East Bakersfield Branch of Bank of America, hereinafter called "the Branch"; that if Merchandise is entitled to recover from Bank of America the amount it seeks to recover, Lofendo's account with the Branch will be overdrawn; that such overdraft will represent an extension of credit by Bank of America to Lofendo which Bank of America was induced to make to Lofendo by the fraud of United and Lofendo in carrying on the kite; that Merchandise by permitting the kite to continue after it knew or should have known that it was going on was in effect participating in such fraud and became liable to Bank of America for any damages it may suffer by reason of such fraud; that on October 20, 1948, Merchandise made false representations to Bank of America

³The answer describes the way in which the kite was carried on (I, 34-35); and Merchandise's reply to the answer admits that the kite was carried on as described in the answer (I, 16).

This fraudulent practice consists of the creation of credits in one bank by the deposit of checks of the agent of the "kiter" to the kiter's credit, and the deposit in the other bank of checks of the kiter to the credit of his agent in sufficient time to meet the agent's checks.

to induce it to continue to pay checks drawn on it by Lofendo payable to the order of United; and that by reason of the facts alleged in the defense Merchandise is estopped to revoke its payment of the checks (I, 33-45).

When at the end of the trial Merchandise filed its amended complaint, it was stipulated that Bank of America's amended answer should stand as an answer to the amended complaint (II, 827-830).

Bank of America filed as part of its answer an interpleader counterclaim against Lofendo, Eugene O'Riley, trustee in bankruptcy of United, and Merchandise. This interpleader counterclaim alleges in substance that if Merchandise does not recover in this case its payment of the four and six checks there will be a balance left in the Lofendo account of \$30,920.36; that Merchandise, O'Riley and Lofendo have claimed this balance; and that Bank of America has no claim thereto and is ready to deposit the same in court; and it prays that Merchandise, O'Riley and Lofendo be required to interplead their claims to the balance (I, 48-54).

Merchandise answered that if it were held in the action that Merchandise is not entitled to judgment, then Merchandise claims the balance (I, 18-19); O'Riley filed an answer claiming the balance (I, 20-22); and Lofendo filed an answer disclaiming any interest in it (I, 7).

B. Statement of jurisdictional facts.

As alleged in the amended complaint and admitted by the answer, Merchandise is a national banking association located in Chicago, and Bank of America is a similar association located in California and the matter in controversy exceeds, exclusive of interest and costs, \$3,000.00 (I, 61-62). And so the District Court had jurisdiction under section 1348 of Title 28, U.S.C.

This court has jurisdiction to review the judgment under Section 1291, Title 28, U.S.C. and Rule 73 F.R.C.P.

II. STATEMENT OF THE CASE.

When on November 17, 1948⁴ the kite being carried on by United collapsed, Merchandise had in its hands checks aggregating more than \$500,000.00 drawn by Lofendo on Bank of America to the order of United which were part of the kite. When the kite collapsed, these checks could not be collected and so Merchandise sustained a loss occasioned by the kite in excess of \$500,000.00.

If the judgment in this case stands, Merchandise will have succeeded in recovering from Bank of America \$203,047.00 of this loss, with interest, a most extraordinary result in view of the fact that Merchandise's loss arose out of the kite and that it either

⁴As all the events in this case took place in 1948, we hereafter in stating dates will refer only to the month and day and not the year; it will be understood that the year of each date will always be 1948.

had knowledge of the kite or failed by the grossest sort of negligence to discover it.

The important facts in the case are undisputed and the appeal is based entirely upon errors of law and erroneous and unwarranted inferences drawn by the trial court from the undisputed facts.⁵

When the Branch received as part of the kite checks drawn by United to Lofendo's order, it would either give Lofendo immediate credit for them or send them on to Merchandise for collection and payment. On November 10th the Branch received for deposit to Lofendo's account through the mail what we have already called the four checks, that is checks for \$89,813.10 drawn by United on Merchandise and payable to Lofendo. On that date the Branch forwarded the four checks to Merchandise for collection.

Merchandise received the four checks on November 12th. On that date it debited the four checks against United's account, credited Bank of America, perforated the checks with a stamp reading "Paid November 12, 1948", and sent the Branch four instruments, to which we will refer as "advices of credit", each of which stated in substance that that one of the four checks referred to in it had been "paid" and its amount credited to Bank of America.

⁵On the trial there was a conflict in the testimony with respect to what was said in conversations between officers of Merchandise and Bank of America which occurred on November 17th and 18th. For the purposes of this appeal we accept Merchandise's version of these conversations. Even so, as we will point out, the inferences drawn by the trial court from these versions were erroneous and unwarranted.

On November 13th the Branch received for deposit to the Lofendo account through the mail what we have already called the six checks, that is six checks aggregating \$113,216.50 drawn by United on Merchandise and payable to Lofendo; and on that date the Branch sent them forward to Merchandise for collection.

Merchandise received the six checks on November 15th and on that date it debited them against United's account, credited Bank of America, perforated the checks with a stamp "Paid November 15, 1948", and mailed the Branch one advice of credit to the effect that the checks had been "paid" and their amounts credited to Bank of America.

Late in the afternoon of November 17th, after Merchandise had been told by Rosenthal, the secretary of United that United had engaged in transactions with Merchandise which would cause Merchandise a heavy loss, Frederick Messenger, then the controller of Merchandise, telephoned the Branch and talked with Frank Estribou, its manager. Messenger testified that in this conversation he told Estribou that United had perpetrated a fraud on Merchandise by pledging to it fictitious accounts receivable as collateral; that Merchandise had paid the six checks in error; that Merchandise was rescinding the advice of credit with respect to these checks and did not want the Branch to enter the credit or pay checks against it; and that Estribou replied that the Bank of America would not make such entry.

The trial court found that Merchandise did not pay the four and six checks; that Bank of America did not become indebted to Lofendo for these checks; and that Bank of America did not change its position in reliance upon Merchandise's payment of them and is therefore not a bona fide purchaser of them.

There is no dispute with respect to the essential facts upon which these findings are based; and so the question on this appeal is whether as a matter of law the trial court erred in making these findings. Bank of America contends that it did; that Merchandise paid the checks absolutely and unequivocally; that when it paid them Bank of America became indebted to Lofendo; and that its position was changed by their payment and that therefore it is in the position of a bona fide purchaser.

At the close of business on November 16th, prior to the telephone conversation between Messenger and Estribou on November 17th, Lofendo became indebted to the Branch in the sum of \$172,094.84 on account of an overdraft. Bank of America contends that it acquired a banker's lien on the proceeds of the four and six checks to secure this indebtedness of Lofendo to it; that therefore it became a bona fide purchaser of such proceeds and so is entitled to retain them.

Bank of America also contends upon the basis of the undisputed facts that Merchandise received a substantial benefit from its payments of the four and six checks and therefore cannot recover these payments.

The trial court made no findings with respect to the allegations of Bank of America's answer that Merchandise either knew or should have known of the kite and so is precluded from recovering the payments. Bank of America contends that these allegations are a defense to the action and that therefore the trial court's failure to find respecting them is reversible error. It also contends that its counterclaim, which is based upon the fact that Merchandise knew or should have known of the kite, is a good counterclaim and that for this reason also the court's failure to make such findings is error.

Although the court did not find with respect to Merchandise's knowledge of the kite, it did find in effect that Bank of America was negligent in not discovering the kite. Bank of America contends that this finding is contrary to the undisputed testimony and is therefore erroneous; and also that even if Bank of America were negligent in not discovering the kite, the fact that Merchandise knew or should have known of the kite was nevertheless a good defense to Merchandise's claim.

The trial court also found that Merchandise never made any representations to Bank of America to induce it to pay checks drawn on the Lofendo account. Bank of America contends that the finding is contrary to the uncontradicted evidence and is erroneous.

On November 18th, Allen R. LeRoy, a vice-president of Merchandise, arrived in San Francisco from Chicago and had conversations with Roland T.

Duncan, an assistant vice-president of Bank of America, and with Kenneth M. Johnson, an attorney in Bank of America's legal department.

The trial court found in effect that in the telephone conversation between Messenger and Estribou of November 17th and in these conferences of November 18th Bank of America agreed with Merchandise not to act upon the advice of credit with regard to the six checks and to return this advice to Merchandise. In other words, the trial court found in substance that an agreement was made between Merchandise and Bank of America under which Bank of America agreed in effect that Merchandise's payment of the six checks should be rescinded and that Bank of America would repay the amount thereof to Merchandise and would surrender whatever liens or other rights it might have with respect to the six checks and their proceeds. Bank of America, as it must on this appeal, accepts as true Messenger's and LeRoy's versions of the conversations. But it contends that their versions of the conversations show Merchandise's officers were not negotiating for a contract, but took the position that they had the right to rescind the advice and that they were directing its rescission; that Bank of America's officers merely acquiesced in this assertion of an alleged right; and that there was no intention to create a contract and none was created.

But Bank of America contends that if it be assumed for argument's sake that the alleged agree-

ment was made, then it was invalid and unenforceable, because not supported by a consideration, because based on a mutual mistake and because induced by Merchandise's false representations and its suppression or concealment of facts which it was under a duty to divulge.

The case involves many technical points. But underlying them all is this crucial fact: Merchandise is in reality seeking to recover part of a loss suffered by it because of the kite of which it knew, or should have known, and which it allowed to continue; in justice it should not be permitted to recover from Bank of America any part of the loss which it brought upon itself.

III. SPECIFICATIONS OF ERROR RELIED UPON BY BANK OF AMERICA.

1. The trial court's findings, that the four and six checks were not paid or collected (I, 108-109; 100-101; 114), are erroneous.

2. The trial court's findings, that when Merchandise debited the four and six checks against United's account there were apparent credit balances in the account, but that there were in fact no such balances but an overdraft of \$500,000.00 (I, 108-109; 100-101), are erroneous.

3. The trial court's findings, that under an agreement between United and Merchandise the Lofendo checks delivered by United to Merchandise as remittances were taken by Merchandise for collection only

and that these checks created conditional credits in United's commercial account with Merchandise (I, 99), are erroneous.

4. The trial court's findings, that Bank of America did not become indebted to Lofendo for the four and six checks (I, 114), are erroneous.

5. The trial court erred in not finding that Bank of America had a banker's lien on the proceeds of the four and six checks to secure the indebtedness owing it by Lofendo, and that consequently Merchandise is not entitled to recover the payments.

6. The trial court erred in not finding that as Merchandise received substantial benefit from its payment of the four and six checks, it is precluded from recovering these payments.

7. The trial court's findings, that Bank of America prior to receiving notice of Merchandise's claim did not change its position in reliance upon the payment of the four checks and is therefore not a bona fide purchaser of such payment (I, 109-111; 114), are erroneous.

8. The trial court's findings, that Bank of America, prior to receiving notice of Merchandise's claim, did not change its position in reliance on the payment of the six checks and was therefore not a bona fide purchaser of such payment (I, 103-104; 114), are erroneous.

9. The issue, whether Merchandise either knew of the kite or was guilty of negligence in not discovering it, was material, and therefore the trial court erred in not finding with respect to it.

10. The trial court's findings, that no act or omission of Merchandise proximately caused any loss sustained by Bank of America (I, 112), are erroneous.

11. The trial court's findings, that it is not true that Merchandise ever made any representations to Bank of America to induce it to pay checks drawn on the Lofendo account to the order of United or to give anyone credit for any checks of United drawn on Merchandise to the order of Lofendo, and that it is not true that Bank of America in reliance on representations of Merchandise ever paid any checks drawn on the Lofendo account or ever gave anyone credit for checks drawn by United on Merchandise (I, 113), are erroneous.

12. The findings of the trial court, that as early as October 22nd Bank of America became suspicious that the Lofendo account was being operated as part of a check kiting operation and that on November 10th it became positive that this was so (I, 105-106), are erroneous.

13. The court erred in finding that, in the telephone conversation between Messenger and Estribou of November 17th and in the conferences between LeRoy and officers of Bank of America of November 18th, Bank of America agreed not to act upon the advice of credit with respect to the six checks and to return this advice to Merchandise (I, 101-103).

14. The court erred in not finding that, if such a contract were made, it was invalid and unenforceable because not supported by a consideration, be-

cause based on a mutual mistake and because induced by Merchandise's false representations and its suppression or concealment of facts which it was under a duty to divulge.

15. The court erred in finding that Bank of America became indebted to Merchandise in the amounts of the four and six checks (I, 115).

IV. ARGUMENT.⁶

A. THE SIX AND FOUR CHECKS WERE PAID, AND THE TRIAL COURT'S FINDING TO THE CONTRARY IS ERRONEOUS.

1. The relevant facts.

From time to time after September 6, 1948, checks drawn by United to the order of Lofendo came in the mail to the Branch in envelopes bearing the imprinted return address of the Bakersfield Inn, Bakersfield, California (IV, 1175). On some occasions when these checks arrived at the Branch immediate credit was entered in the amount of the checks in the Lofendo account; and on other occasions no credit was entered in the Lofendo account, but the checks were sent forward to Chicago to Merchandise on which they were drawn, under cover of a collection letter (IV, 1175-1176).

On November 10th the four checks arrived at the Branch in the mail; and on that day the Branch sent them with a collection letter to Merchandise.

⁶The subject index of this brief at its beginning is in effect a summary of our argument and so in a sense is our statement of the case. And therefore we did not consider it necessary to precede our argument by a summary.

The four checks arrived at the office of Merchandise on November 12th. On that day Merchandise mailed to the Branch the advices of credit with respect to the four checks each of which described one of the checks and bore the stamp "Paid November 12 Merchandise National Bank of Chicago". On November 12th Merchandise perforated and cancelled each of the checks by a perforated stamp reading "Paid November 12, 1948". And on November 13th, Merchandise, pursuant to the practice of delayed posting,⁷ charged the four checks against the commercial account of United as of November 12th; and on November 13th, Merchandise, pursuant to the same practice, credited Bank of America as of November 12th with the amount of the four checks on the ledger kept by Merchandise to show the transactions between it and Bank of America (I, 90-91; 301-306; deft's. ex. H, the ledger card of the account kept by Merchandise to show its transactions with Bank of America; and deft's. ex. HH, the commercial ledger of United's commercial account with Merchandise).

Merchandise never returned the four checks to Bank of America, nor did Merchandise at any time

⁷It was stipulated that "in-clearings" meant checks drawn on Merchandise and presented to it through the clearing house, and that "counter work" meant all debits and credits other than in-clearings; that Merchandise posted all counter work on the next business day after the day on which it was handled, but the posting appeared under the date on which it was actually handled, that is, there was "delayed posting" of counter work; that Merchandise posted in-clearings of any day on that day as debits, but the posting occurred under the date of the previous business day, that is, there was "pre-posting" of in-clearings; and that Bank of America used the same system of posting (III, 959-961).

offer to do so, except that in Merchandise's closing brief in the trial court it made such an offer (I, 90).

On November 13th, the six checks arrived at the Branch in the mail; and on that date the Branch sent them with a collection letter to Merchandise (IV, 1176). The six checks arrived at the office of Merchandise on November 15th (IV, 1176). On that day Merchandise mailed to the San Francisco head office of Bank of America the advice of credit with respect to the six checks, which described all of the checks and bore the stamp "Paid November 15, Merchandise National Bank of Chicago" (IV, 1176). This advice of credit, debt's. ex. A, appears on page 94 of the record.

The advice of credit was received at the San Francisco head office of the Bank of America on November 18th, but that department of Bank of America had no function to perform with respect to it other than to treat it as a misrouted item and forward it by mail to the Branch where the collection had originated; and this was done as a matter of routine by the clerical staff (IV, 1177). It arrived at the Branch on November 19th (IV, 1177).

On November 15th Merchandise perforated and cancelled each of the six checks by a perforated stamp reading "Paid November 15, 1948". On November 16th Merchandise, pursuant to the practice of delayed posting, charged the six checks against the commercial account of United as of November 15th; and on November 16th, Merchandise, pursuant to the same practice, credited Bank of America as of November

15th with the amount of the six checks on the ledger kept by Merchandise to show transactions between it and Bank of America (I, 289-294). All of these acts were performed in accordance with the regular routine and practice of the Bank (I, 298).

Merchandise returned the six checks to Bank of America by Messenger's letter of November 19th (deft's. ex. D); but Bank of America returned them to Merchandise by Estribou's letter of November 22nd (deft's. ex. L). And then Merchandise by a letter of its attorneys dated December 3, 1948 (Ex. A of deft's. answer; I, 55-56), tendered them to Bank of America stating that it seemed "pointless to be mailing the checks back and forth".

When Merchandise performed these acts with respect to the four and six checks, it paid them unequivocally and absolutely.

2. Under the law the checks were paid.

Bank of America contends that an Illinois statute (section 207a of its Negotiable Instruments Act) in itself establishes that Merchandise paid the checks; and so it is first necessary to determine whether the Illinois law should be applied to the decision of this question.

It is true that as this is a diversity case the law of California should be applied. *Erie Railroad v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817. But the law of California embraces its conflict of laws rules; and so under the doctrine of the *Erie* case those rules should be applied. *Klaxon Co. v. Stentor Electric Mfg. Co.*,

313 U.S. 487, 61 S.Ct. 1020. The contracts evidenced by the four and six checks were to be performed in Chicago, Illinois, by the payment of these checks by plaintiff. The California law is that the law of the place where a contract by its terms is to be performed governs all matters connected with its performance. Section 1646 of the California Civil Code; *Hutchinson v. Hutchinson*, 48 Cal. App. (2d) 12, 119 P. (2d) 214; *Monarch Brewing Co. v. George J. Meyer Mfg. Co.*, 9 Cir., 130 F. (2d) 582. And so under the California law the question whether the checks were paid is governed by the Illinois law. The same conclusion would be reached under the general law with respect to conflicts of law. 9 C.J.S. sec. 214, p. 463; 8 Zollman, Banks and Banking (perm. ed.) sec. 5603, p. 361, and sec. 5691, p. 455.

In 1948 section 207a of the Illinois Negotiable Instruments Act⁸ (Rev. Stat. Ill., 1947, ch. 98, sec. 207a; Illinois Laws of 1943, Vol. 1, page 949) provided that a drawee bank has until the end of the next business day after presentation of a check to it by mail "to decide whether or not it will pay the check". This means, of course, that if it does not decide within that time to reject the check, the check is then

⁸In 1948 section 207a provided:

"The drawee bank named in a check presented to it by mail or through a clearing house association, or through a settlement with another bank or banks, or for deposit in an account in the drawee's bank is allowed until the end of the next business day following the day of presentation to decide whether or not it will pay the check."

The section was amended in 1949 to state in more detail the rules relating to the payment of checks; but, of course, the section as it stood in 1948 controls this case.

deemed to have been paid. Section 16c of the California Bank Act which was in effect in 1948 (in 1949 it was superseded by the California Banking Code) provided substantially the same thing as section 207a.⁹

LeRoy and Duncan had a telephone conversation on November 17th prior to the former's departure for California on the night of that day (II, 480). In this conversation LeRoy told Duncan that he believed that Bank of America had no right to reject checks for \$57,694.97, which Bank of America had rejected on November 12th and returned to Merchandise, because it had delayed too long in rejecting them (II, 480). When LeRoy saw Duncan on the morning of November 18th, Duncan explained to LeRoy the routing of the three checks and LeRoy then agreed that Bank of America had rejected them in time (II, 480-481). This incident illustrates the point that if a bank does not reject a check within the time allowed it by the applicable statute, whether the Illinois section 207a or the California section 16c, it in effect pays the check. It also illustrates that Merchandise wants the benefit of this rule when it works in its

⁹The provisions of section 16c of the Bank Act having this effect read:

“* * * any check, note or other instrument providing for the payment of money and drawn on or payable at the same bank allowing such credit shall either be found good or else returned unpaid, or notice of dishonor duly sent, at or before the end of the next succeeding business day when such check, note or other instrument has been received during business hours and at or before the end of the second succeeding business day when such check, note or other instrument has been received after business hours.”

favor, but wants to repudiate it when it works against it.

Section 207a in itself establishes that the checks were paid.

The Illinois courts have held without reference to section 207a that when a bank marks a check "paid" and charges it against the account of its depositor, it unequivocally manifests an intention to accept and pay the check and cannot thereafter change its position; and that this is so even though the payment of the check overdraws the depositor's account, or even though the bank at the time it pays the check has the right to apply the depositor's account to the payment of his indebtedness to it. *Gillette v. Williams-ville State Bank*, 310 Ill. App. 395, 34 N.E. (2d) 552; *Hay v. First National Bank of Springfield*, 244 Ill. App. 286; *American Exchange National Bank v. Gregg*, 138 Ill. 596, 28 N.E. 839; *O. B. Avery Co. v. Highway Commissioner of Road District*, 363 Ill. 279, 2 N.E. (2d) 77.

In the case last cited the court said:

"Where a bank receives a check drawn on the drawer's checking account in it, stamps the check paid, charges it to the account of the drawer and credits the payee with the amount, the check is regarded as paid. *People v. People's Bank & Trust Co.*, 353 Ill. 479, 486, 187 N.E. 522, 89 A. L. R. 1328; *American Exchange Nat. Bank v. Gregg*, 138 Ill. 596, 28 N. E. 839, 32 Am. St. Rep. 171."

The law of other jurisdictions is the same. *Hallenbeck v. Leimart*, 295 U. S. 166, 55 S. Ct. 685; *Security National Bank v. Old National Bank*, 8 Cir., 241 F. 1; *Hayes v. Tootle-Lacy Bank*, 10 Cir., 72 F. (2d) 429; *Nineteenth Ward Bank v. First National Bank*, 184 Mass. 49, 67 N.E. 670; *First National Bank v. Noble*, 179 Ore. 26, 168 P. (2d) 354; *Spokane and Eastern Trust Co. v. Huff*, 63 Wash. 225, 115 P. 80; *Oregon Iron & Steel Co. v. Kelso State Bank*, 129 Wash. 109, 224 P. 569.

9 C.J.S. 502 states:

“Where checks are sent to the bank on which they are drawn for collection, the collection and payment are ordinarily regarded as completed when the bank charges the checks on its books to the account of the drawer or where it charges them to the account of the drawer and marks them ‘paid’.”

Checks perform the function of money. The great bulk of payments in this country is made by checks. It is essential, therefore, that the question whether or not a check has been paid be governed by precise and certain rules. Otherwise there would be chaos, not only in banking, but in the entire business world. This is the philosophy underlying Illinois' section 207a and California's section 16c. And it is the philosophy underlying all clearing house rules requiring banks to reject checks presented in the clearings within a specified limited time or be deemed to have paid them.

3. There were good balances to United's account when the checks were debited against the account.

The ground upon which Merchandise mainly relies in contending that the checks were not paid is incorporated in the findings of the trial court that when it debited the checks against the account there were apparent credit balances therein, when in fact there were no such balances, but an overdraft of over \$500,000 (I, 100).

It makes no difference whether there were good or only apparent credit balances to United's account when the checks were paid. Under section 207a a bank pays a check by not rejecting it in time even though such payment overdraws the account. And under the cases we have cited, a bank pays a check by stamping it paid and charging it against the account of the drawer even though such payment creates an overdraft in the account. But as a matter of fact this finding of the court is contrary to the undisputed evidence.

The copy of the ledger of United's commercial account with Merchandise, defendant's exhibit HH, shows that as of November 10th there was a balance of \$7,673.09 to the credit of United in its commercial account with Merchandise. The evidence is that after the end of October, Merchandise was not paying against uncollected funds in its commercial account and so this balance of \$7,673.09 was all collected funds (III, 1014). November 11th was a holiday and no entries appear on this ledger sheet as of that day. This ledger sheet shows that on November 12th, after

all checks, including the four charged against the account on that date, were deducted, the balance to the credit of United was \$77,617.55.

Defendant's exhibit HH also shows that at the close of business on November 13th, which was a Saturday, there was a balance to the credit of United of \$241,525.04; that on November 15th, which was Monday, the six checks, together with other checks, were debited to the account; that on that date amounts aggregating \$76,093.55 were credited to the account; and that on the close of business on November 15th the balance to the credit of United was \$176,650.65.

During the period from July 1st to November 17th Merchandise maintained a loan to United of \$200,000.00, which was Merchandise's legal limit, that is, the largest amount which Merchandise, under section 34, Title 12, U.S.C., could loan any one person (III, 904; 951-953). United's indebtedness to Merchandise was secured by assignments of accounts receivable (III, 953). When on any day United had in its hands checks of debtors owing it accounts receivable assigned to Merchandise as security, United would endorse such checks and deliver them to Merchandise, together with a remittance sheet specifying the debtors who had delivered such checks to it and the amount of such checks (III, 981-984). Merchandise would thereupon apply such remittance (that is the aggregate amount of such checks) on account of United's indebtedness to it and on the same day Merchandise would make an additional loan to United in

the amount of such remittance so as to maintain United's indebtedness to it at \$200,000.00 (II, 761-763). Although Merchandise made United a new loan on each day that a remittance was received and applied on account of United's indebtedness, the remittance was not a basis for such new loan, but such new loan was an independent transaction based on a new note and secured by a new collateral consisting in the assignment of new accounts receivable (III, 928-929).

Although Merchandise was making new loans to United in amounts far in excess of Merchandise's legal limit of \$200,000.00, the net amount of its loans was kept at \$200,000.00 in the following manner: On the fifth of each month United would execute to Merchandise a note for \$200,000.00 maturing on the fifth of the following month. All other notes executed by United to Merchandise during such month to evidence additional loans made by Merchandise to United during that month would also mature on the fifth day of the following month. On the fifth day of each month, the note for \$200,000.00 executed during the preceding month would be renewed by the execution by United to Merchandise of a new note in a like amount, and on the same date all other notes executed by United to Merchandise during the preceding month would be retired and paid by the application to them of the remittances delivered by United to Merchandise during the month during which such notes were executed. During each month the difference on any day between the aggregate re-

mittances received during such month and the aggregate of the notes executed during such month was maintained at \$200,000.00. In other words, the remittances received during any month were considered as cash offsetting the indebtedness under the notes executed during any such month so that Merchandise considered it was not loaning United more than its legal limit. (Stipulation marked deft's. ex. NN, IV, 1275 to 1282; and deft's. ex. II, the note liability ledger of United with Merchandise; and deft's. ex. KK, the assigned accounts receivable ledger of United with Merchandise.) But it made each new loan before collecting the checks representing the remittances it received on the date the loan was made; so, if these checks were not collected, it would not be able to offset the amount of them against the loan, with the result that the indebtedness of United would exceed the legal limit by the amount of such checks (II, 504-505; 507-508).

As we shall show later, United delivered to Merchandise during the first sixteen days of November remittances consisting of Lofendo checks aggregating the enormous total of \$998,326.98; and during this period Merchandise, pursuant to its practice of loaning United an amount equal to each remittance, loaned United this same amount and took United's notes to evidence the loans. (It was truly a fantastic state of affairs.)

The amounts of all notes executed by United to Merchandise were credited to its commercial account; and on November 13th approximately ninety percent

of the amount to United's credit in the account consisted in such credits (IV, 1176-1177).

After November 15th Lofendo checks aggregating \$534,548.18, which United had delivered to Merchandise as remittances, were returned to Merchandise without having been paid, and Merchandise thereupon during the period from November 17th to November 28th exercised its right of setoff by charging such Lofendo checks against the amount to the credit of United in its commercial account (I, 231-237; III, 914-917; III, 787; plt's. ex. 4 for identification, consisting in the checks for \$534,548.18; and deft's. ex. HH, the ledger sheets of United's commercial account with Merchandise).

The basis of Merchandise's contention that the balances to the credit of United when the four and six checks were charged against these balances were apparent and not good balance is that if these Lofendo checks aggregating \$534,548.18 had been returned to Merchandise prior to November 12th when the four checks were charged against the account or prior to November 15th when the six checks were charged against it, there would have been no balance to the credit of United, but an overdraft in excess of \$500,000.00.

Under the general law Merchandise had a right, which was optional with it, to offset any credit balance in United's account against United's indebtedness to it arising when the Lofendo checks were not paid. 9 C.J.S. 614-618. But Merchandise did not exercise this right until after November 15th.

The form of note executed by United to Merchandise (plt's. ex. 5) gave Merchandise the right to apply any balance to the credit of United against any indebtedness due by United to it before the maturity of such indebtedness. But this provision of the note cannot be of any help to Merchandise. Merchandise may have had the right to charge an unmatured indebtedness due it by United against United's account; but again we say that it did not exercise that right until after November 15th.

The trial court found that under the agreement between Merchandise and United the Lofendo checks delivered by United to Merchandise on account of accounts receivable constituted conditional credits in the amounts of such checks, subject to charge back at any time before actual collection of the funds (I, 99). As shown in the appendix to this brief, the finding is not supported by the evidence. But the point is not important. Assuming that Merchandise did not have an agreement permitting it to offset the amount in which United became indebted to it upon the dishonoring of the Lofendo remittance checks, still it had this right under the law. But the crucial fact is that it did not exercise the right until after the four and six checks had been paid, and so when these checks were paid there were good balances to United's credit.

The facts, therefore, are that the balances to United's credit on November 12th and 15th when the four and six checks were paid were mainly the proceeds of loans made by plaintiff to United; that when the Lofendo checks were not paid the indebtedness

of United to Merchandise on account of which they had been applied was restored, and United had a right to offset the balance to United's credit against this indebtedness, but that this right was not exercised until after November 15th after the four and six checks were paid; and that consequently the balances to United's credit when these checks were paid were good, not merely apparent, balances.

When Merchandise made its loan to United and took the latter's notes, United was bound by the notes, and Merchandise had the right either to affirm the transactions and hold United liable on the notes or to disaffirm the transaction on the ground of fraud and sue to recover the amounts lent. In other words, the loans were voidable, not void; and until Merchandise disaffirmed the loans, it could not say that the crediting of their proceeds to United's account created an apparent and not a real balance in United's favor.

Assuming for the sake of argument that Merchandise did not know what was going on, its mistake was not in charging the checks against apparent balances, but in believing that the transactions on which it based its loans to United were bona fide when in fact they were part of the kite.

But we say again that if it be assumed that the credits against which the four and six checks were charged were apparent and not good balances, nevertheless under the law these checks were paid and the trial court's findings that they were not is without any doubt erroneous.

B. UPON MERCHANDISE'S PAYMENT OF THE CHECKS THE AGENCY OF BOTH BANK OF AMERICA AND MERCHANDISE FOR THEIR COLLECTION TERMINATED, AND MERCHANDISE THEREUPON BECAME INDEBTED TO BANK OF AMERICA AND BANK OF AMERICA TO LOFENDO IN THE AMOUNTS OF THE CHECKS.

The question whether a bank takes title to paper deposited with it or whether it becomes the agent of the depositor for collection is a question of intention. Where a bank gives its depositor an absolute credit it is presumed, unless a contrary intent is shown, that it has taken title; but when a bank gives its depositor a provisional credit subject to charge back if not collected, it is presumed, unless a contrary intent is shown, that it has not taken title but is an agent for collection. And when a bank does not give its depositor any sort of credit but sends the paper forward for collection, it does not take title but is an agent for collection. See 9 C.J.S., 472-475.

When, therefore, Bank of America, upon the deposit of the four and six checks with it, sent them forward for collection, it did not take title to the checks, but became Lofendo's agent for their collection.

Prior to the adoption of section 16c of the California Bank Act (Act 652 of Deering's California laws) the law of California appeared to be in accord with the so-called Massachusetts rule. *Davis v. First National Bank of Fresno*, 118 Cal. 600, 50 F. 666; *San Francisco National Bank v. American National Bank*, 5 Cal. App. 408, 90 P. 558; and *Nicholetti v. Bank of Los Banos*, 190 Cal. 637, 214 P. 51.

Section 16c provided that a bank allowing a provisional credit for a check should not be liable in the event of the insolvency or other default of any bank handling its collection. The adoption of this statute confirmed the Massachusetts rule as the law of this state so far as checks for which provisional credit has been allowed are concerned.

In brief, the Massachusetts rule is that the collecting bank is not the agent of the forwarding bank for the collection of the check, but the subagent of the depositor.¹⁰

It follows that defendant was the agent of Lofendo for the collection of the checks and that plaintiff was Lofendo's subagent for this purpose.

In handling a collection a forwarding bank can instruct the collecting bank to collect and remit, or to collect and credit. When the forwarding bank instructs the collecting bank to collect and remit, there is a conflict in the authorities respecting the result. Some cases, like *Hecker-Jones Jewell Milling Co. v. Cosmopolitan Trust Co.*, 242 Mass. 181, 136 N.E. 333, hold that when a forwarding bank instructs a collecting bank to collect and remit and the collecting bank collects by charging the check against the account of

¹⁰The difference between the Massachusetts rule and the New York rule is that under the New York rule the collecting bank is the agent of the forwarding bank and not the subagent of the depositor and therefore the forwarding bank is not liable for the negligence of the collecting bank; whereas under the Massachusetts rule, as the collecting bank is the subagent of the depositor, the forwarding bank is not liable for its negligence, provided it has been selected with due care. 9 *C. J. S.* 482-484, sec. 228b and sec. 230a.

the drawer, it becomes the owner of the proceeds and the relation between it and the owner of the check ceases to be that of agent to principal and becomes that of debtor and creditor and the proceeds cannot be impressed with a trust on the theory that the collecting bank continues to hold them as agent. The theory of such cases is that when the instructions are to collect and remit the owner of the check by using banks to make the collection impliedly contracts that the collecting bank in accordance with well known usages may mingle the proceeds of the collection with its own funds and become the owner of them and that when it charges the account of the drawer, it merely reduces its debt to the drawer and increases its own assets by means of book entries and so obtains no res which can be regarded as the subject matter of a trust.

Other cases, like *People v. People's Bank of Rockford*, 353 Ill. 479, 187 N.E. 522 (a case on which plaintiff relied strongly in the trial court), hold that when the forwarding bank instructs the collecting bank to collect and remit, the collecting bank after charging the account of the drawer continues to hold the proceeds of the collection as the agent of the owner of the check and that therefore such proceeds while in its hands can be impressed with a trust. The theory of such cases is that when the instructions are to collect and remit it cannot be assumed that the owner of the check acting through his agent, the forwarding bank, had any intention of becoming a depositor, that is a creditor, of the collecting bank; that

therefore the law should not compel him to take that position; and that when the collecting bank charges the check against the drawer's account, it becomes the holder of a res upon which a trust may be impressed in the same manner as though the owner of the check had withdrawn the currency and handed it back with instructions to remit.

In *People v. People's Bank* just cited the court expressly stated that if the instructions had been to collect and remit by the collecting bank's own check, or if there had been reciprocal accounts between the forwarding and collecting bank, it would have reached the opposite result. The reason for this dictum is obvious. If the instructions are to remit by the bank's own check or if there are reciprocal accounts, the collecting bank upon charging the check against the account of the drawer becomes the owner of the fund and therefore takes the position of a debtor and there is nothing upon which a trust may be impressed.

A discussion of the conflict in the cases to which we have just referred and a citation of the cases on both sides appears in 9 C.J.S. 508-510, section 248b.

However, there is no conflict in the cases when the instructions of the forwarding bank are to collect and credit.

When there are reciprocal accounts and the instructions are to collect and credit, there can be no doubt that the intent is that the collecting bank upon charg-

ing the check against the account of the drawer is to become the owner of the funds and is to become a debtor. And so the cases involving reciprocal accounts without exception hold that when the collecting bank collects the check by charging it against the account of the drawer, thereupon the agency of the forwarding bank and the subagency of the collecting bank for the collection of the check terminate and the collecting bank becomes the debtor of the forwarding bank and the forwarding bank of its depositor for the amount of the check. (*Dean Tobacco Warehouse Co. v. American National Bank*, 123 Tenn. 365, 117 S.W. (2d) 746; *Maget v. Bartlett Bros. Land and Loan Co.*, 226 Mo. App. 416, 41 S.W. (2d) 849; *Storing v. First National Bank*, 8th Cir., 28 F. (2d) 587; *Rickey v. New York State National Bank*, D.C. N.D. N.Y., 7 Fed. Supp. 29 (the decision was affirmed without opinion in 70 F. (2d) 1020, 2d Cir.); and *First National Bank of Richmond v. Davis*, 114 N.C. 343, 19 S.E. 280.

In *Dean Tobacco Warehouse Co. v. American National Bank* just cited, the court quoted from 9 *C.J.S.* 497 as follows:

“ ‘There are two usual methods of handling items forwarded for collection; that of reciprocal accounts and that of remittance. Under the reciprocal accounts method the collecting bank on receipt of payment of the item, gives credit on its books to the forwarding bank and the forwarding bank charges the collecting bank on its

books, the banks settling from time to time with the one or the other in accordance with the accumulated balance. Under the remittance method the forwarding bank sends the item to the collecting bank with instructions to collect and remit immediately. Under the reciprocal accounts method the relation of the banks is that of creditor and debtor. Under the remittance method the collecting bank is not authorized to retain the proceeds in its hands and therefore acts only as an agent for the forwarding bank.' ”

The same result is reached when there are not reciprocal accounts between the forwarding and collecting banks and the instructions of the forwarding bank are to collect and credit; that is in such a case the agency of the forwarding bank and the subagency of the collecting bank terminate upon the collection of the check by the charging of it against the account of the drawer and the crediting of the forwarding bank, and therefore the collecting bank becomes indebted to the forwarding bank and the forwarding bank to the depositor in the amount of the check. *Hekler v. Ward*, D.C. E.D. Penn., 21 F. Supp. 710; *People ex rel. Nelson v. Sheridan Trust and Savings Bank*, 358 Ill. 290, 193 N.E. 186; *First National Bank of Corsicana v. Cameron & Co.*, 149 S.W. (2d) 132.

In *People ex rel. Nelson v. Sheridan Trust and Savings Bank*, just cited, the court said:

“Until the time that the check was collected, the candy company could have revoked the agency,

but when the payment of the check was made, at the close of the business day on which the check was collected, the purpose of the agency had been completed and the relation of debtor and creditor was fixed between the parties * * * The Sheridan bank could not then, nor could any intermediate bank participating in the collection of the check, rescind its action, nor could any of the banks deny the existence of the unconditional credit to the funds entered upon their respective books of account."

Therefore, so far as this phase of the case is concerned, if defendant's instructions to plaintiff were to collect and credit rather than to collect and remit, that fact decisively establishes that Merchandise upon the payment of the checks became the debtor of Bank of America and Bank of America the debtor of Lofendo.

It was stipulated that the collection letter sent by Bank of America to Merchandise with the four checks was dated November 10th and was in the same form as the collection letter sent by Bank of America accompanying the six checks which was introduced in evidence as defendant's exhibit G (I, 302-303). The collection letter accompanying the six checks is reproduced on page 1268 of the record. It was addressed to Merchandise and stated that the items "described below [the six checks] were enclosed for collection." It then provided "Please make separate remittance or credit for this collection as indicated below." The

letter then stated "please dispose of all proceeds as indicated by letter 'K' ". The letter "K" reads as follows:

"K. Credit Bank of America N. T. & S. A. with advice to this branch."

The four advices of credit relating to the four checks (deft's. ex. J) are reproduced on pages 1269-1270 of the record. There is printed on each of them the following three sentences with a dotted line before each sentence:

".....We inclose our check in payment.

.....We credit your account with total shown above.

.....We return the above-described item unpaid."

Merchandise by checking the second sentence on each advice of credit informed Bank of America that it had followed the instructions of the collection letter by crediting Bank of America's account.

The one advice of credit relating to the six checks (deft's. ex. A) appears on page 94 of the record. It is in the same form as the other advices. And Merchandise by checking the second sentence on the instrument informed Bank of America that it had followed the instructions of the collection letter by crediting Bank of America's account.

During 1948 Merchandise had sums on deposit with Bank of America (I, 175). The ledger sheet of Mer-

chandise's account with Bank of America was introduced in evidence as plaintiff's exhibit 1. It shows that the four checks were charged against Merchandise's account on November 18th and the six checks on November 19th.

Bank of America did not keep money on deposit with Merchandise; but Merchandise kept an account of its transactions with Bank of America. The ledger sheet of this account was introduced in evidence as defendant's exhibit H. It shows that Merchandise credited Bank of America with the amount of the four checks on November 12th and with the amount of the six checks on November 15th.

Messenger testified that defendant's exhibit H was "an internal document" used by Merchandise to record the transactions between it and Bank of America and that no copy, transcript or statement of it was ever sent Bank of America (I, 312-313). Later he testified that Merchandise kept exhibit H to show the balances which Bank of America owed it and that therefore Merchandise entered on exhibit H in the ordinary course of business debits in its favor and credits in favor of Bank of America (I, 322-323).

The fact that Bank of America did not have money on deposit with Merchandise does not mean that the accounts between them were not reciprocal. Nor does the fact that Merchandise did not send Bank of America statements drawn off its account mean this. 1 Cal. Jur. 143-144, sec. 4, says:

“Mutual accounts are made up of matters of setoff, where there is a debt on one side which constitutes a credit on the other, or where there is an express or implied understanding that mutual debts shall be satisfied or setoff pro tanto between the parties.”

Webster's New International Dictionary defines mutual as “reciprocally acting or related”. The transactions between the two banks were “matters of set-off”; a credit given by Merchandise to Bank of America was a charge by Bank of America against Merchandise. Their accounts were, therefore, mutual or reciprocal.

It thus appears that the instructions given by Bank of America collection letters were that Merchandise should collect and credit; that Merchandise followed these instructions and informed Bank of America by the advices that it had done so. It is also true that the accounts between the banks were reciprocal.

It follows indubitably, in the light of the cases cited above, that when Merchandise debited the four and six checks to United's account and credited defendant, the agency of Bank of America and the subagency of Merchandise for the collection of the checks thereupon terminated and Merchandise became the owner of the proceeds of the checks and became indebted to Bank of America and Bank of America became indebted to Lofendo in the amount of the checks.

And we should add that under these authorities the result would have been the same if there had not been reciprocal accounts between the two banks, but the instructions of Bank of America had been what they were, that is that Merchandise should collect and credit.

**C. STATEMENT OF RELEVANT FACTS RELATING
TO LOFENDO ACCOUNT.**

Points D to and including G of this brief must be decided on the basis of these facts. As this is so we will state them here in full and then in our discussion of these points refer to such of them as are relevant.

We should have in mind the stipulation already mentioned with respect to the practice of both Merchandise and Bank of America in posting in-clearings and counter work; the former were preposted, and there was delayed posting of the latter.

The following statement is based mainly on the written stipulation marked plaintiff's exhibit 14 (IV, 1175-1183). Those facts in it not appearing in this stipulation will be supported by citation of the record.

At the close of business at the Branch on November 10, 1948, there was a balance to the credit of Lofendo of \$13,061.17, all in collected funds. On November 15th checks of Lofendo drawn on his account totalling

\$75,586.86 were received at the Branch in the clearings. \$51,862.36 of these checks were payable to United (II, 771-773). The checks payable to United were Lofendo checks received as remittances by Merchandise and applied by it on account of United's indebtedness to it. (See remittance sheet of November 6th, part of deft's. ex. FF; and deft's. exs. JJ and KK, sheets from the note liability ledger and assigned accounts receivable ledger kept by Merchandise to show United's indebtedness to it and the collateral therefor.) When the Branch paid these checks United's indebtedness to Merchandise was reduced; and so Merchandise got the benefit of the payment.

As on November 15th, when the checks for \$75,586.86 were received at the Branch there was only a balance of \$13,061.17 to Lofendo's credit, there were insufficient funds in the account to pay them. When the \$75,586.86 was received on November 15th, the Branch under section 16c of the California Bank Act had until the end of the next succeeding business day to reject them. But it did not reject them, and so under the law it in effect paid them although it had not charged them against any credit in the account.

On November 15th checks for \$97,207.00 drawn by United on Merchandise to the order of Lofendo were received at the Branch in the mail; and, pursuant to the practice of delayed posting, the Branch on November 16th gave Lofendo immediate credit for this \$97,207.00 as of the 15th. Estribou, the Branch's man-

ager, testified that the giving of this credit to Lofendo was contrary to his instructions and a mistake (I, 374-375). But, of course, Bank of America was bound by the act of its clerk in allowing Lofendo this credit.

On November 15th, the Branch forwarded these checks for \$97,207.00 to the Continental Illinois Trust Company in Chicago so that it could collect them from Merchandise through the Chicago Clearing House.

On November 16th there arrived in the Branch in the in-clearings three checks for \$109,569.15. These checks aggregating \$109,569.15 were likewise payable to United (II, 771-773), and were Lofendo checks which had been received as remittances by Merchandise and applied by it on account of United's indebtedness to it (see remittance sheets of November 8th and 9th, part of deft's. ex. FF, and said deft's. exs. JJ and KK). When the Branch paid these checks United's indebtedness to Merchandise was reduced; and so Merchandise got the benefit of the payment.

As stated, the Branch had until the close of business on November 16th, within which to reject the checks for \$75,586.86; and as also stated, it did not reject them. And the Branch had until the close of business on November 17th within which to reject the checks for \$109,569.15. And so on November 16th the Branch had in its hands checks of Lofendo drawn

on the account aggregating \$185,156.01 (the checks for \$75,586.86 plus the checks for \$109,569.15); and at that time there was to the credit of Lofendo the \$13,061.17 of collected funds, plus the credit for the checks of \$97,207.00 which were uncollected.

The Branch did not reject either the checks for \$75,586.86, or the checks for \$109,569.15; but on November 16th it debited the checks for \$109,569.15 against the amount of the credits then in the account, that is, \$110,268.17 (the credits of \$13,061.17 of collected funds and of \$97,207.00 of uncollected funds). As the credit for \$97,207.00 was uncollected, the Branch paid \$96,507.98 of the checks for \$109,569.15 against uncollected funds; and when it did so Lofendo in effect had overdrawn his account, and so had become indebted to Bank of America in the sum of \$96,507.98.

Pursuant to the practice of delayed posting of counter work the credit of \$97,207.00 was posted on November 16th as of November 15th; and pursuant to the practice of preposting in-clearings the debit of the checks for \$109,569.15 was made on November 16th, the date of the receipt of these checks, as of November 15th. The result was that the ledger sheet of Lofendo's account shows that as of the close of business on November 15th the balance to the credit of Lofendo was \$699.02.

And so at the close of business on November 16th Lofendo had a credit balance of \$699.02, and he was

indebted to the Branch in the sum of \$75,586.86 (that is, in the amount of the checks which the Branch could have rejected up to the close of business on that day but did not reject) plus the \$96,507.98 drawn by him against uncollected funds, a total indebtedness of \$172,094.84.

On November 16th there arrived at the Branch the advices of credit stating that the four checks for \$89,813.10 had been paid. This amount was credited to the account on November 17th. Pursuant to the practice of delayed posting this credit was actually posted on the 18th as of the 17th. When this credit was entered there was created on the books of the Branch a credit balance in Lofendo's favor of \$90,512.12 (the \$89,813.10 plus the credit balance at the close of business on November 15th of \$699.02). Concurrently with the entering on the books of the credit for \$89,813.10, the checks for \$75,586.86 were charged against the account. The result, as shown by the ledger card of the account, was that the credit balance to the account as of the close of business on November 17th was \$14,925.26. Although the account showed this credit balance as of the close of business on November 17th, the checks for \$97,207.00 had not been paid as of that day, and so at the close of business on that day Lofendo was in fact indebted to the Branch in the difference between \$97,207.00 and the credit balance of \$14,925.26, or in the sum of \$82,281.74.

In the late afternoon of November 18th, the Branch received a wire from the Continental Illinois that Merchandise had rejected the checks for \$97,207.00; and so on that day it was established that Lofendo's indebtedness to the Branch in the sum of \$82,281.74 would not be satisfied by the collection of the checks for \$97,207.00.

On November 19th, the advice of credit for the six checks for \$113,216.50 was received at the Branch; and on that day the account was credited with this amount; and on the same day the account was debited with the \$97,207.00. Pursuant to the practice of delayed posting, these last entries were made on November 20th as of November 19th, and so the ledger card shows that at the close of business on November 19th, there was a balance to Lofendo's credit of \$30,934.76 (the credit balance as of the close of business on November 17th of \$14,925.26, plus the \$113,216.50, less the \$97,207.00).

D. BANK OF AMERICA HAD A LIEN UPON THE PROCEEDS OF THE FOUR AND SIX CHECKS AND THEREFORE MERCHANDISE IS PRECLUDED FROM RECOVERING ITS PAYMENTS OF THE CHECKS.

It will be recalled that the four checks were collected and paid on November 12th and the six checks on November 15th; that at the close of business on November 16th the Branch had in its hands the advices of credit with respect to the four checks, and at that time the advice of credit with respect to the six checks was in the mail addressed to Bank of America, Merchandise having mailed it on November 15th; and that at the close of business on November 16th Lofendo was indebted to the Branch in the sum of \$172,094.84.

The legal consequences of these circumstances are these: Bank of America on November 16th, prior to its receiving any notice of Merchandise's claim, acquired a lien on the proceeds of the checks to secure Lofendo's indebtedness to it. Bank of America, upon becoming entitled to this lien, became a holder for value of such proceeds. Or if Bank of America did not become such a holder, it became a bona fide purchaser of a right to set off such proceeds against the indebtedness due it, a right in the nature of a lien. As Bank of America was such holder or bona fide purchaser, Merchandise is precluded from recovering its payments of the checks.

Section 3054 of the California Civil Code provides:

“A banker has a general lien, dependent on possession, upon all property in his hands be-

longing to a customer, for the balance due to him from such customer in the course of the business.”

The lien allowed a bank under this section secures any indebtedness due it by a customer, including overdrafts. (*Bromberg v. Bank of America*, 58 Cal. App. (2d) 1, 135 P. (2d) 689.)

Merchandise contends that a banker's lien under Section 3054 is dependent on possession; that under the Massachusetts rule prevailing in California, Merchandise was not Bank of America's agent for collection, but Lofendo's; that therefore Merchandise's possession of the checks was not Bank of America's; and that as Bank of America gave up its possession when it sent them forward for collection, it thereupon lost its lien upon them.

Kane v. First National Bank, 5th Cir., 56 Fed. (2d) 534, and the case of *Goggin v. Bank of America*, 183 Fed. (2d) 322, recently decided by this circuit, directly overrule this contention.

In the *Kane* case the Court, in holding that a bank had a banker's lien on checks deposited with it for collection and did not receive a voidable preference by offsetting prior to bankruptcy their proceeds against an indebtedness due it by the bankrupt, said at pages 537-538:

“The contract was one for collection and credit: that is to say, the bank, though taking legal title to the checks by indorsement, was only an agent for the depositor, who remained the owner until

by actual collection the bank became liable to the depositor as for a general deposit, the proceeds becoming at the same moment the property of the bank. [Citing cases.] * * * The banker's lien extends not only to the application of moneys and cash balances, but to the retention and collection of commercial paper and securities which have come into the banker's hands in the ordinary course of business and with no agreement to the contrary. * * * The lien of course survives the customer's insolvency. * * * We do not think the sending of the checks to correspondents for whose diligence and fidelity the bank was agreed not to be responsible waived the lien. The agreement was but a statement of the Massachusetts rule of liability in respect of out-of-town checks taken for collection * * * which rule is of force in Texas without a special agreement. * * * The banker, though he acts under the Massachusetts rule of liability, does not waive his lien by proceeding to collect in the usual way. Although technically the collecting bank is the agent of the depositor, they are actually unknown to one another. The forwarding bank has practical control of the collection, is expected to receive the proceeds, and ordinarily does receive them. * * *"

In the *Goggin* case, the court held that the bank, by virtue of section 3054, had a lien on checks deposited with it for collection and that therefore it could apply the amount collected by it after bankruptcy on account of the checks to the payment of an indebtedness due it by the bankrupt. The court, citing the *Kane* case, said at pages 325-326:

“It seems to us that the banker’s lien clearly was intended to apply to this type of situation. * * * The appellee Bank at the ‘date of cleavage,’ that is, when the bankruptcy proceedings were commenced and before collection of the commercial paper proceeds of which the receiver here claims, held such paper as agent of Salsbury [the bankrupt], the owner thereof. We conclude that as of that time the Bank had a lien by operation of Section 3054 of the California Civil Code, and that neither the bankruptcy proceedings nor the attempt to terminate the agency could affect such lien.”

There can be no doubt, therefore, that under section 3054 a bank has a lien on checks deposited with it for collection and that it does not surrender this lien by forwarding them for collection. If it were held that a bank surrendered its lien on collection item in this way, it would be completely illusory to say that the bank had a lien on them at all.

In *Gonsalves v. Bank of America*, 16 Cal. (2d) 169, 105 P. (2d) 118, the court drew a distinction relevant here between a bank’s lien on securities and its right to offset. The court said at pages 173-174:

“The banker’s lien described in this statute [section 3054] is, properly speaking, a lien on the securities such as commercial paper deposited with the bank by the customer in the course of business. The so-called ‘lien’ of the bank on the depositor’s account or funds on deposit is not technically a lien, for the bank is the owner of the funds and the debtor of the depositor, and

the bank cannot have a lien on its own property. The right of the bank to charge the depositor's fund with his matured indebtedness is more correctly termed a right of setoff, based upon general principles of equity * * *

* * * despite the technical inaccuracy involved in calling it a lien, it is in the nature of a lien or security interest in the funds, similar to and enforceable in the same way as the lien against commercial paper. That is to say, it is enforceable by the bank's own act, without the aid of a court."

And so when a bank collects a check, it ceases to have a technical lien on the check, but it then acquires a right of setoff which is "in the nature of a lien or security interest in the fund."

When on November 12th and 15th Merchandise paid the four and six checks Lofendo was not indebted to Bank of America. He did not become indebted to Bank of America until the close of business on November 16th. A bank, of course, does not have a banker's lien under section 3054 on a depositor's securities unless the depositor is indebted to it. And so, as Lofendo did not become indebted to Bank of America until after the checks were paid, Bank of America never did have a lien on the checks themselves, but at the close of business on November 16th it had a right to offset the credit to which Lofendo became entitled on the payment of the checks against Lofendo's indebtedness to it, which right was in the

nature of a lien or security interest in the fund created by Merchandise's payment of the checks.

Section 3108 of the California Civil Code (section 27 of the Negotiable Instruments Act) provides:

“Where the holder has a lien on the instrument, arising either from contract or by implication of law, he is deemed a holder for value to the extent of his lien.”

If Bank of America prior to receiving notice of Merchandise's claim had acquired a lien on the checks themselves and had therefore become under this section a holder for value, Merchandise in that event could not have recovered the payments. Restatement, Restitution, section 33. According to our understanding, Merchandise does not controvert this proposition and so we will not dwell on it.

Merchandise, however, argues that as the checks were paid prior to Lofendo becoming indebted to the Bank and as therefore Bank of America did not acquire a lien on the checks themselves, it cannot be regarded as a holder for value under section 3108.

Bank of America's answer is that you cannot separate in this way a negotiable instrument from its proceeds; that the main purpose of the negotiable instruments law is to protect the holder of such an instrument so that he will receive its proceeds free of any equities; and that it if were held that one who does not acquire a lien on an instrument itself, but does acquire a lien on the fund created by its pay-

ment, is not a holder for value, this main purpose of the law would be defeated.

Bank of America has not been able to discover any authority dealing with the point; and so far as we know, neither has Merchandise. It is submitted that as Merchandise's view would impair the negotiable character of commercial paper, but Bank of America's view would preserve and promote that character, the latter should be accepted.

But assuming, for argument's sake, that Bank of America did not become a holder for value under section 3108, nevertheless Bank of America did become a bona fide purchaser for value of its right of setoff, or lien, whichever one wishes to call it; and therefore Merchandise is not entitled to recover the payments.

Section 14 of the Restatement of the Law of Restitution says (p. 55):

“(1) A creditor of another or one having a lien on another's property who has received from a third person any benefit in discharge of the debt or lien, is under no duty to make restitution therefor, although the discharge was given by mistake of the transferor as to his interests or duties, if the transferee made no misrepresentation and did not have notice of the transferor's mistake.

Comment:

a. The rule stated in this section is a specific application of the underlying principle of bona fide purchase. Comment a on section 13 is applicable.”

Comment a on Section 13 says in part:

“a. The principle that a person who innocently has acquired the title to something for which he has paid value is under no duty to restore it to one who would be entitled to reclaim it if the one receiving it had not been innocent or had not obtained the title or had not paid value therefor, is of wide application, being a limitation upon the principle that a person who has been wrongly deprived of his things is entitled to restitution. This limitation involves no moral issue, since it merely creates convenient rules for determining which of two innocent persons should bear a loss which must be borne by someone.”

The law, therefore, is that where a creditor receives on account of the obligation due him a benefit from a third person without having notice that the benefit was conferred by mistake, the creditor has the right to retain it; he has the title and he received it without notice and so he is in the position of a bona fide purchaser.

We refer the court particularly to all the illuminating illustrations to section 14 (pp. 57-58). We quote one of them as follows:

“6. A steals an automobile and mortgages it to B who lends him \$500 thereon. A then borrows \$700 from C telling C of B's mortgage. In accordance with his agreement with A, C pays B \$500 to discharge B's mortgage and gives A \$200, taking a mortgage for \$700. The owner of the car reclaims it. C is not entitled to restitution from B.”

This is very like the recent case of *Hilliard v. Bank of America*, 102 Cal. App. (2d) 730, 228 P. (2d) 327, in which a hearing was denied by the California Supreme Court. The California Supreme Court has accepted the restatement as decisive even when in conflict with its own prior decisions. *Speck v. Wylie*, 1 Cal. (2d) 625, 36 P. (2d) 618. But if it were necessary to show by citation that the California courts have approved the rule of the restatement quoted above, the *Hilliard* case would suffice.

The case at bar falls exactly within the rule of the restatement. When on November 16th Lofendo became indebted to Bank of America, it thereupon prior to receiving notice of Merchandise's claim acquired its right of setoff or lien on the fund created by Merchandise's payment of the checks. It can no more be deprived of this right or lien by thereafter learning that Merchandise conferred the benefit by mistake than a creditor to whom machinery has been mortgaged to secure the obligation due him can be deprived of his mortgage upon learning after the mortgage has been consummated that the person from whom his debtor obtained title to the mortgaged property claims the right to set aside the transfer on the ground of fraud or mistake.

Even if Bank of America was not a holder for value under section 3108, it was a bona fide purchaser of its right of setoff or lien, and therefore Merchandise cannot recover its payments.

E. MERCHANDISE CANNOT RECOVER FROM BANK OF AMERICA ITS PAYMENT OF THE FOUR AND SIX CHECKS BECAUSE IT RECEIVED A SUBSTANTIAL BENEFIT FROM THEIR PAYMENT.

70 *C. J. S.* 368 states the applicable rule as follows:

“The rule permitting recovery of payments made under mistake of fact is not necessarily applicable in all circumstances. Since the rule is founded on considerations of equity and good conscience, there can be no recovery of a payment from which the payor has received a substantial benefit, or which the payee has received in good faith and may in good conscience retain.”

It will be recalled that there was charged against the credit for the four checks of \$89,813.10 the checks for \$75,586.86; and that there was included in these checks for \$75,586.86 checks for \$51,862.36 drawn by Lofendo on the Branch and payable to United and delivered by United to Merchandise as remittances on account of assigned accounts receivable and applied by Merchandise on account of United's indebtedness to it. When United's indebtedness to Merchandise was reduced by this \$51,862.36, it got the benefit of the charging of these checks against the \$89,813.10. And so if Merchandise recovers the \$89,813.10, it will in effect have been paid twice; once when it got the benefit of the checks charged against this \$89,813.10 and again when it recovers this amount. Under the rule just cited, this inequitable and unconscionable result precludes a recovery by Merchandise of its payment of the four checks.

On the same ground Merchandise is precluded from recovering its payment of the six checks. It will be recalled that the checks for \$109,569.15 drawn by Lofendo on his account with the Branch were charged against the checks for \$97,207.00 drawn by United on its account with Merchandise and credited by the Branch to Lofendo's account; that when the checks for \$97,207.00 were presented to Merchandise for payment, Merchandise rejected them; that then the \$97,207.00 was charged against the credit for the six checks of \$113,216.50; and that the Lofendo checks for \$109,569.15 were delivered by United to Merchandise as remittances on account of assigned accounts receivable and were applied by Merchandise on account of United's indebtedness to it. When United's indebtedness was reduced by this payment, Merchandise got the benefit of it. If Merchandise is permitted to have the \$109,569.15 charged against the \$97,207.00 and at the same time to recover the \$113,216.50 against which the \$97,207.00 was charged, it will be getting the benefit of the \$97,207.00 disbursed by Bank of America and at the same time will be denying Bank of America the benefit of its payment of the six checks. Under the law this inequitable and unconscionable result precludes Merchandise from recovering its payment of the six checks.

Merchandise's answer to this argument is that it was a holder in due course of the checks for \$51,862.36, which were charged against the credit of the four checks, and of the checks for \$109,569.15 which were

in effect charged against the credit of the six checks; that as such holder it was entitled to the payment of these checks; and that when Bank of America makes the contention under discussion it is in effect claiming that it is entitled to recover its payment of them.

The argument is entirely specious. In this action Merchandise is not suing as a holder in due course to enforce the payment of a check. Nor is Bank of America endeavoring to recover the payment of checks paid by it. But Merchandise is suing to recover its payments of the four and six checks on the ground that it was induced to pay them by mistake. Under the law it cannot maintain the action if it received a substantial benefit from the payments and therefore is not in equity and good conscience entitled to recover them. In deciding the point, one should not consider each check as though it were an isolated transaction, but one should consider all the circumstances to determine whether in fact and reality Merchandise did secure a substantial benefit from its payment of the four and six checks. As such circumstances show that it did, it cannot under the law recover.

F. BANK OF AMERICA'S POSITION WAS CHANGED BY REASON OF MERCHANDISE'S PAYMENT OF THE FOUR CHECKS AND THEREFORE IT BECAME A BONA FIDE PURCHASER OF THEIR PAYMENT.

It will be recalled that the trial court found that when on November 17th the Branch received notice that United had defrauded Merchandise it had not

changed its position in reliance on Merchandise's payment of these checks and that therefore it did not become a bona fide purchaser of the payments.

Merchandise maintains that this finding is supported by *Weiner v. Roof*, 19 Cal. (2d) 748, 122 P. (2d) 896. Bank of America contends that it is contrary to the law laid down by that case.

In the *Weiner* case Connolly contracted to sell Roof a parcel of land so that Roof could subdivide it. They created a subdivision trust under which the Citizens Bank was the trustee and agent to receive the purchase price of lots and to apply such payments to the expenses of the trust and then to the payment of the amount due Connolly and to pay the remaining balance to Roof. Weiner, after having been induced by fraud to purchase a lot, rescinded the sale and sought to recover from the Citizens Bank the amount he had paid it on account of the price. The Bank, before Weiner rescinded the sale, had applied what Weiner had paid it to the expenses of the trust and on account of an indebtedness due it by Connolly. The court held that the Bank's position had been changed by the payment; that it was, therefore, in the position of a bona fide purchaser; and that consequently Weiner could not recover the payment.

Merchandise claims that Bank of America held the payment of the proceeds of the four checks as the agent of Lofendo; that it did not act in reliance on the payment until November 18th when it posted the credit for the four checks to the Lofendo account; and that consequently under the rule of the *Weiner*

case its position was not changed by the payment and it did not become a bona fide purchaser.

Bank of America has several answers to this contention.

(a) In the first place the evidence shows without conflict that when on November 18th Bank of America posted the credit of the four checks, it had received no notice of Merchandise's claim with respect to the payment of these checks.

The trial court found that on November 17th and on November 18th Merchandise informed Bank of America that United had defrauded Merchandise of a large sum of money exceeding \$500,000 and had done so by means of fictitious and fraudulent checks drawn on the Lofendo account, and that consequently Bank of America did not become a bona fide purchaser of the payment of the four checks (I, 111). The finding is not supported by the evidence. Messenger testified that in his telephone conversation with Estribou of November 17th, he told Estribou that United had perpetrated a fraud on Merchandise and that one of its officers had admitted that it had pledged fraudulent accounts receivable to Merchandise (I, 220-221); that he had a list of checks received from Lofendo and wanted to ascertain whether or not any of these checks had been paid (I, 221); and that the advice of credit for the six checks had been sent out in error (I, 223). The rest of the conversation related to this advice of credit and other incidental matters not at all relevant here (I, 223-225).

LeRoy testified that in his conversation with Duncan of November 18th he told Duncan that Merchandise had been swindled and had suffered a heavy loss in its transaction with United (II, 480, 481); and that he had with him a list of Lofendo checks, the fate of which he wanted to determine (II, 483-484). The remainder of his conversations with Duncan and with Duncan and Johnson related to the advice of credit for the six checks and other matters not relevant here (II, 448-461, 482-497).

Messenger did not tell Estribou and LeRoy did not tell Duncan and Johnson that as found by the court United had defrauded Merchandise "by means of fictitious and fraudulent checks drawn on the Lofendo account." Messenger's explanation to Estribou of the fraud was that an officer of United had told Merchandise that United had pledged to Merchandise fictitious collateral. LeRoy did not explain to Duncan or Johnson how United had "swindled" Merchandise. It is true that both Messenger and LeRoy wanted to determine the date of the Lofendo checks; but in the conversations neither of them stated how Merchandise had received these checks, and neither of them said that Merchandise had been defrauded "by means of fictitious and fraudulent" Lofendo checks.

But if they said this, what difference would it make? The question here is not whether Messenger or LeRoy gave Bank of America notice that the checks drawn on the Lofendo account were fictitious, but whether either of them gave defendant notice that

Merchandise had made a mistake in paying the four checks. And neither of them did. The four checks were not mentioned in the conversations.

Merchandise's idea that it would recover its payment of the four checks from Bank of America was an afterthought. This is demonstrated by the fact that it did not even seek to recover this payment in this action until the very end of the trial when it obtained leave of court to amend its complaint to include a demand for the payment.

The statements of Messenger and LeRoy that United had defrauded Merchandise were entirely consistent with the fact that Merchandise had not made any mistake in paying the four checks. Merchandise itself thought so because, as just stated, it made no claim with respect to the four checks until the end of the trial.

Merchandise's contention is that Bank of America did not act in reliance on the payment of the four checks until it posted the credit on November 18th. Assuming for argument's sake that the contention is sound, the fact is that Bank of America performed those acts before notice of any claim by Merchandise with respect to the four checks; consequently under the rule of the *Weiner* case Bank of America must be regarded as a bona fide purchaser of the payment.

(b) But if it be assumed for argument's sake that in the telephone conversation of November 17th Bank of America received notice of Merchandise's claim with respect to the four checks, and if it also be as-

sumed for the same purpose that under the rule of the *Weiner* case Bank of America in order to become a bona fide purchaser of the payment was required before receiving such notice to take action in reliance on the advices of credit with respect to the four checks, still the record shows that Bank of America did take such action and therefore did become a bona fide purchaser of the payment.

It will be recalled that it was stipulated that both Merchandise and Bank of America posted "in-clearings" as of the day next preceding the day of their presentation, and that it posted counter work (all debits and credits other than in-clearings) "on the next business day after the day on which they were handled, but the posting appeared under the date on which they were actually handled"; in other words, that in-clearings were preposted and there was delayed posting of counter work (III, 960-961).

The stipulation marked plaintiff's exhibit 14 states that the checks for \$75,586.86 were received at the Branch in the in-clearings on November 15th and were kept at the Branch until November 17th "when they were put in the counter work" (IV, 1181); that the advices of credit with respect to the four checks for \$89,813.10 were received on November 16th (IV, 1182); that this sum was "credited to the account on November 17th" and posted on the 18th and "concurrently the checks for \$75,586.86 were charged against the new funds" (IV, 1183).

In short, the facts are these: both the advices of credit for the four checks and the checks for \$75,-586.86 were handled in the counter work of November 17th. Pursuant to the practice of delayed posting, the credit for the \$89,813.10 and the debiting thereto of the checks for \$75,586.86 were posted on the 18th; but they were posted on that day as of November 17th, the day on which the banking operation took place. Plaintiff's Exhibit 35, the ledger card of the Lofendo account, shows that both the credit and the debit were posted as of the 17th.

Messenger testified that his telephone conversation with Estribou started at 4:17 P.M. central standard time on November 17th (I, 218-219). It was stipulated that in November of 1948, California was on daylight savings time (I, 219-220). And so in that month Chicago time was one hour, instead of two, ahead of California time. Estribou testified that when the conversation took place, the collection department of the Branch was closed and that therefore he could not tell Messenger definitely whether the advice of credit for the six checks had been paid (I, 396).

It thus appears that the telephone conversation did not occur until hours after the counter work of the day had been started and when it was being brought to an end.

If, as Merchandise contends, Bank of America cannot be held to be a bona fide purchaser of the payment of the four checks until it had acted on the advices of credit, the fact is that the banking operation,

in which the credit was allowed Lofendo and the debit made against it, took place on November 17th before the telephone conversation of that day. When this banking operation took place, Bank of America had certainly acted on the advices of credit. The fact that Bank of America pursuant to the practice of delayed posting did not make the bookkeeping entries until November 18th can make no difference. It is the banking operation itself, not the bookkeeping entries, which must control. The crediting of the four checks on November 17th and the putting of the checks for \$75,586.86 in the counter work of that day fixed at the very latest the rights of Lofendo and Bank of America, even if the transaction had never been recorded on the books at all. There is no magic in book entries. The rights of persons cannot be made to depend on whether or not they are made.

In *Briviesca v. Coronado*, 19 Cal. (2d) 244, 120 P. (2d) 649, the court said:

“The liability of the bank to the depositor payee is not based upon the check or any promise to pay the check, but arises from the relationship of debtor and creditor that exists between a bank and a depositor. (See cases cited in 7 Am. Jur. 313, sec. 444.) In the instant case this relationship came into existence at the time the deposit was made, not at the time the check was stamped and the account posted in the ledger.”

In *American Exchange National Bank v. Gregg*, supra (138 Ill. 596, 28 N.E. 839, 841), the court said:

“Something has been said in regard to the fact that the check given to D. Eggleston & Son had not been actually charged to Kershaw & Co. on the books of the bank until after the check involved was presented and payment demanded. We do not regard this as a controlling element in the case. This was a matter of bookkeeping, and the rights of the parties are not to be determined merely from the manner in which books are kept.”

And in *Nineteenth Ward Bank v. First National Bank*, supra (184 Mass. 49, 67 N.E. 670, 671), the court said:

“It is true that the proper records were to be made upon the books, but the payment is affected by the acts, and not by the record, and was valid even without records. Consequently the question of the subsequent records is not material. So far as respected the plaintiff, the defendant had received the money for the note, and was bound to remit it to the plaintiff.”

(c) But under the rule of the *Weiner* case it was not necessary for Bank of America to have acted on the advices of credit by putting them through any banking operation or by entering them on its books in order to become a bona fide purchaser of the payment.

The difference between Merchandise and Bank of America with respect to the rule of that case is this: Merchandise maintains that under its doctrine an agent who is a creditor of his principal can never

become a bona fide purchaser of a payment made to him on his principal's account until he has actually made the bookkeeping entries crediting the principal with the amount of the payment.

Bank of America contends on the other hand that the intention of the parties disclosed by the facts must control; that when the intention is that the agent shall hold the money on behalf of his principal and it is not anticipated that the agent shall not apply it to the payment of any indebtedness the principal might owe him, then there must be some affirmative act of the agent after receiving the payment applying it on account of the principal's indebtedness before the agent will be deemed a bona fide purchaser; but that when the intention is that any payment received by the agent shall be applied on account of the principal's indebtedness to him, then the agent upon receiving the payment and without any additional affirmative act will be deemed a bona fide purchaser.

If Bank of America's position be not sound, then the rights of the parties would depend, not on what was intended, but on a fortuitous circumstance, that is, whether the agent did or did not make bookkeeping entries. This cannot be the law. The fact that it is not the law is shown by the following extract from the Weiner decision (19 Cal. (2d) 748, 754):

"They [cases theretofore referred to by the court] fail to distinguish between an agent who holds the money on behalf of his principal after crediting it to the principal's account and an

agent who has received the money, with the consent of the principal, in payment of a debt owed to him by the principal. In the latter situation the agent is in the position of a bona fide purchaser for value; in the former he is not.

When Merchandise paid the four checks on November 12th and credited Bank of America, Merchandise became indebted to Bank of America and Bank of America to Lofendo in the amount of the four checks. Assuming for argument's sake that this is not so, still at the very latest Lofendo became entitled to the credit on November 16th when the advices of credit arrived at the branch. Certainly the Branch could not have said to him on that day, "Yes, we have received the advices that the checks have been paid, but we have not entered the credit on our books and so you are not yet entitled to it." And when Lofendo became entitled to the credit on November 16th, he was, as we have seen, indebted to the Branch in the sum of \$172,094.84 on account of overdrafts.

This is not a case in which it was intended that Bank of America should hold payments made to it on account of checks collected by it for Lofendo and not apply such payments to overdrafts in Lofendo's account. But it is a case in which it was intended that Bank of America should *ipso facto* apply any such payments against any such overdrafts; that the debits would be automatically offset by the credits; and that this should take place without regard to

when the bookkeeping entries were made recording the transactions.

It follows that at the close of business on November 16th, before there was even a possibility that Bank of America had received notice of Merchandise's claim with respect to the four checks, the credit for these checks to which Lofendo was entitled on that date was offset by the debits for his overdrafts; and, therefore, under the rule of the *Weiner* case, on that date Bank of America's position was changed by the payment of the four checks and it became a bona fide purchaser of the payment.

(d) The *Weiner* case is just one illustration of a change in a payee's position preventing a recovery of a payment. But any change in a payee's position will have this result. The general rule is stated in 70 *C.J.S.* 372 as follows:

"In general, where a payee has changed his position to his prejudice in reliance on the payment and cannot be placed in statu quo, the payment cannot be recovered, although made under a mistake of fact; * * *"

As we have seen, when on November 10th Bank of America sent the four checks to Merchandise for collection, it was Lofendo's agent for their collection. But when on November 12th Merchandise paid the checks and credited Bank of America with the payment, Bank of America became a creditor of Merchandise and a debtor of Lofendo in the amount of the payment and Bank of America's agency for the collection of the checks thereupon terminated. There-

fore the making of the payment itself brought about definite and important changes in Bank of America's position. Bank of America, instead of being Lofendo's agent for the collection and payment of the checks, had become the creditor of Merchandise and the debtor of Lofendo in the amount of the payment. In the *Weiner* case, the agency continued after the payment; in this case it terminated upon the payment being made. In the *Weiner* case, the bank which was the agent in that case did not become the creditor of the payor, but received the funds themselves; in this case Bank of America upon the payment being made became a creditor of the payor. There were, therefore, in this case more drastic changes in the payee's position than those involved in the *Weiner* case. It follows that Merchandise under the general rule cannot recover the payment.

(e) Summing up this discussion: Bank of America became a bona fide purchaser of and entitled to retain the payment of the four checks for these reasons: (1) Bank of America received no notice of Merchandise's claim with respect to the four checks until long after November 18th when the bookkeeping entries were made. (2) Although the bookkeeping entries were not made until November 18th, Bank of America had acted in reliance on the payment of the four checks on November 17th, before the telephone conversation of that day, by on that day crediting the four checks to the account and putting the checks for \$75,586.86 in the counter work as a charge against the credit. (3) But under the doctrine of the *Weiner*

case it was not necessary for Bank of America to have actually based a banking operation or made bookkeeping entries on the basis of Merchandise's payment of the four checks in order to become a bona fide purchaser of the payment. On November 16th, before there was any possibility that Bank of America had received notice, the credit for the four checks to which Lofendo was entitled on that date was automatically offset by the overdraft in his account even though no bookkeeping entries of the transaction had ever been made; and so under the rule of the *Weiner* case Bank of America became a bona fide purchaser. (4) Bank of America's position was changed because by virtue of Merchandise's payment of the checks Bank of America's agency for their collection was terminated and it became Merchandise's creditor in the amount of the payment.

G. BANK OF AMERICA'S POSITION WAS CHANGED BY REASON OF MERCHANDISE'S PAYMENT OF THE SIX CHECKS AND THEREFORE IT BECAME A BONA FIDE PURCHASER OF THEIR PAYMENT.

The trial court made substantially the same findings with respect to the six checks as its findings with respect to the four, that is, it found that when on November 17th the Branch received notice that United had defrauded Merchandise it had not changed its position in reliance on Merchandise's payment of the six checks, and therefore Bank of America did not become a bona fide purchaser of the payment.

There are differences between Bank of America's position with respect to the four checks and its position with respect to the six. In the telephone conversation of November 17th Messenger did tell Estribou that Merchandise had paid the six checks in error; and the advice of credit with respect to the six checks was not received at the Branch until November 19th and not credited to the account until that day. And so Bank of America cannot make two of the claims with respect to the six checks which it is making with respect to the four, that is, it cannot claim that it did not receive notice of Merchandise's claim with respect to the six checks until long after it had acted on their payment, nor can it claim that it in its banking operations actually took credit for the six checks before the telephone conversation of November 17th.

However, Bank of America did become a bona fide purchaser of the six checks for two of the same reasons that it became such a purchaser of the four, that is, for the same reason discussed in subdivisions (c) and (d) of point F.

(a) When Merchandise paid the six checks on November 15th, it became indebted to Bank of America and Bank of America to Lofendo in the amounts of the payment, and Bank of America's agency for the collection of the checks was then terminated. Assuming for argument's sake that what we have just stated is not so, nevertheless the fact is that Merchandise mailed the advice of credit with respect to the six checks on November 15th. When on that date

Merchandise mailed the instrument, it was delivered to Bank of America and Bank of America in effect became the holder of it. *People v. Larue*, 28 Cal. App. (2d) 748, 753-754, 83 Pac. (2d) 725, 728. When on November 15th Bank of America in this way became the holder of the advice of payment, Lofendo became entitled to the credit. Certainly the Branch could not have said to him on that day, "Yes, the checks have been paid and the advice that they have been paid and that Merchandise National Bank has credited this bank with the amount of payment is in the mail and has therefore been delivered to us, but we have not yet received the advice and have not yet credited it on our books to your account and so you are not entitled to it."

At the close of business on November 16th Lofendo was indebted to Bank of America in the sum of \$172,094.84 on account of overdrafts, and when on November 17th Lofendo's account was credited with the \$89,813.10 and charged with the \$75,586.86, Lofendo remained indebted to the Branch in the sum of \$82,281.74.

As pointed out in our discussion of the four checks, this is a case in which it was intended that Bank of America should *ipso facto* apply any credits to which Lofendo should become entitled against his overdrafts, and that this offset should occur whether or not evidenced by bookkeeping entries.

It follows that at the close of business on November 16th, before Bank of America received notice of Merchandise's claim to its payment of the six

checks, the credit for the six checks to which Lofendo was entitled on that date was offset by the debits for his overdrafts; and that, therefore, under the rule of the *Weiner* case, on that date Bank of America's position was changed by the payment of the six checks and it became a bona fide purchaser of the payment.

(b) As in the case of the four checks, the payment by Merchandise of the six checks on November 15th in itself brought about a change in Bank of America's position, because upon the payment being made Bank of America's agency for the collection of the six checks terminated and it became a creditor of Merchandise and a debtor of Lofendo in the amount of the payment. Under the general rule, this change of position on Bank of America's part precludes Merchandise from recovering the payment.

H. MERCHANDISE KNEW OR SHOULD HAVE KNOWN OF THE KITE AND IS THEREFORE PRECLUDED FROM RECOVERING THE PAYMENTS.

1. The trial court's failure to find with respect to the issue whether Merchandise knew or should have known of the kite.

Where a trial court fails to find with respect to a material issue, the judgment must be reversed. *Marlborough Corporation v. United States*, 9 Cir., 172 F. (2d) 787; *Gillis v. Gillette*, 9 Cir., 177 F. (2d) 7; *Cafritz v. Koslow*, Ct. App. D.C., 167 F. (2d) 749; *Dearborn National Casualty Co. v. Consumers Petroleum Co.*, 7 Cir., 164 F. (2d) 332.

The trial court found that no act or omission of Merchandise proximately caused or contributed to any loss sustained by Bank of America (I, 112); but it made no findings respecting the issue raised by the allegations of Bank of America's answer that Merchandise knew or should have known of the kite. Its position was that assuming these allegations to be true, they constituted no defense to the action, and were therefore immaterial, and no findings respecting them were necessary.

The question, therefore, is this: Assuming that Merchandise knew or should have known of the kite did that fact constitute a defense to the action.

Although Bank of America is entitled to make this assumption, this case, like every law suit, involves more than a decision of technical law points. It also raises the basic question, is it right and just that Merchandise recover what it is seeking to recover. And so this Court in order to decide what is right and just will want to know the facts, that is, it will want to know which of these banks was responsible for the continuance of the kite. The fantastic story revealed by this record places that responsibility squarely on Merchandise.

If this Court, contrary to Bank of America's claim, concludes that the trial court's finding that Bank of America was in effect negligent is supported by the evidence, it will be called upon to decide whose fault was the primary cause of the continuance of the kite, that of Merchandise or of Bank of America. Although

on this appeal Bank of America, because of the trial court's failure to find with respect to the issue, is entitled to assume that Merchandise knew or should have known of the kite, still this Court, we feel sure, in deciding the point just mentioned will want to know the facts relating to Merchandise's behavior with respect to the kite.

2. The evidence shows without conflict that Merchandise knew or should have known of the kite.

When in this statement the expression, "checks on both sides of United's commercial account," is used it shall refer to checks drawn by Lofendo on his account with the Branch payable to the order of United which were credited to United's commercial account with Merchandise and to checks drawn by United on its commercial account with Merchandise payable to the order of Lofendo which were charged against United's commercial account.¹¹

During the period from July 1st to November 19th Henry J. Reichwein was the cashier and vice-president of Merchandise and was the loan officer of plaintiff in charge of its business transactions with United, except that while Reichwein was away on his vacation from September 20th to October 18th LeRoy, to

¹¹There was admitted in evidence as Defendant's Exhibit PP a photostat of United's commercial account with Merchandise for the period commencing July 1st to the date in November when the account was closed (II, 757). On this exhibit red lines were drawn through the figures representing the checks drawn by United to the order of Lofendo and debited against the account, and through the figures representing the checks of Lofendo payable to United credited to the account (II, 753-758).

whom we have already referred, was in charge of the account (III, 946, 956; II, 640-641).

William F. Collins testified that he at the time of testifying was the president of Lincoln National Bank of Chicago (III, 930); that towards the end of September, 1948, when he was cashier of Merchandise, he, after making a cursory examination of United's account, told LeRoy that in his opinion there was "a good possibility" that United was engaged in a kite (III, 936); that LeRoy then investigated the account and told Collins that he agreed that United might be engaged in a kite and that the matter should be discussed with Mr. Redheffer, who was president of Merchandise (III, 936); that Collins and LeRoy then had a discussion with Redheffer (III, 936); that in this discussion Collins told Redheffer that in his opinion the account indicated a possibility of check kiting and LeRoy suggested to Redheffer that a more thorough examination be made of the account and that Redheffer agreed that this should be done (III, 936-937).

LeRoy testified that he did not recall having a conversation with Collins in which Collins told him that there might be check kiting in the account, but that he would not deny that such a conversation took place (III, 628-629).

Redheffer testified that prior to November 17th he never had a discussion with an officer or employee of Merchandise in which he was told that United might be engaged in a kite (III, 1102).

Although Redheffer in effect contradicted Collins' testimony that Collins warned him that United might be engaged in a kite, LeRoy did not contradict Collins' testimony that Collins gave him such a warning. And so the testimony is uncontradicted that in the latter part of September Collins gave such a warning to LeRoy who was at that time the loaning officer in charge of the account.

LeRoy testified that although he did not recall discussing the account with Collins, he recalled discussing it with Redheffer (II, 631); that he discussed with Redheffer the fact that United was drawing heavily against uncollected funds and the fact that there were checks on both sides of the account (II, 632); and that they both agreed that an investigation of the account should be made with respect to these two matters (the drawing on uncollected funds and the checks on both sides) (II, 632); and that Tague, the outside auditor of the bank, was then instructed to examine the books of United with reference to these two matters (II, 632-633).

In November, 1948, and for approximately two years prior to that time Tague was an assistant credit manager of Merchandise and its chief field auditor (III, 1046). He made periodical audits of the United's books and made reports with respect to his audits, which were introduced in evidence as defendant's exhibit UU (III, 1050; and II, 780-783).

Pursuant to the instructions given him by LeRoy, Tague made a special investigation of United's books and made a report, dated October 1st (deft's. ex. R), based on this investigation (II, 633-634).

After the conclusion of the trial Bank of America prepared findings of fact which the trial court refused to sign. These findings appear on pages 119-164 of the record. We can curtail our statement of the evidence by referring at times to these proposed findings.

We will not discuss Tague's report of October 1st here. It is sufficient to say that for the reasons pointed out in Bank of America's proposed findings (I, 129-132) this report should not have allayed any doubts in the minds of Merchandise's officers with respect to the kite suggested by Collins, but should have accentuated their doubts. And LeRoy testified that when Tague submitted the report to him he asked Tague to explain it and that Tague replied by saying substantially what was in the report (II, 652); and that he could not understand the explanation (II, 652).

And the evidence shows without conflict that for the reasons pointed out in Bank of America's proposed findings (I, 130-131) Tague was grossly negligent in making not only his special investigation leading to the report of October 1st, but also his routine audits of United; that he did not notice discrepancies in United's books which would have been obvious to anyone on the most casual inspection and which would have disclosed at once the existence of the kite. Did Tague see these discrepancies and fail to report them, or was he hoodwinked?

On October 4th, after Tague had made his dubious report, LeRoy called in Rosenthal, the secretary of

United; and on October 4th he, Redheffer and Rosenthal discussed "the entire matter" (II, 654-655). In this conference Rosenthal gave LeRoy and Redheffer the same explanation of the checks on both sides as that given by Gassman to Tague as indicated in the latter's report (I, 655).

LeRoy testified:

"Q. And what did you reply to Mr. Rosenthal when he told you that [this explanation of checks on both sides], Mr. LeRoy?

A. If I remember correctly, I told him I didn't understand it.

Q. I will ask you if you didn't give this testimony at page 151 of your deposition:

'Q. Tell us the conversation between you and him at that time.

'A. In substance it was that he said that they paid out these funds for grapes, and then they sold and the proceeds were received by their agent, who was one of the three people referred to, and the agent remitted the money to them.

'I said, "Well, that is very nice, if that is the case, but have those funds deposited in the Bank of America Branch for the credit of the Merchandise National Bank of Chicago, for the United Produce Company and they will arrange for telegraphic advice to us, and the funds will be immediately available."'

Is that the testimony you gave?

A. Yes, sir.

Q. When you said to Mr. Rosenthal: 'Well, now, that is very nice, if that is the case,' did you believe the explanation he was giving you?

A. I didn't understand it" (II, 655-656).

LeRoy did not understand Tague's explanation of his report; and when Rosenthal gave him the same explanation, he did not understand it. Surely a report which one cannot understand is far from being satisfactory. And yet Merchandise was faced by a serious situation. Collins had warned it that United, to whom it was loaning its legal limit, might be engaged in a kite. It had ordered its auditor to investigate the checks on both sides. And its auditor, who had full access to United's books, had rendered a report which the officer then in charge of the loan could not understand. Did it then do anything more to investigate the transactions between United and Lofendo giving rise to the checks on both sides? The answer is that it did absolutely nothing.

In this conference with Rosenthal, LeRoy suggested to Rosenthal that United should cause the California funds to be deposited to the credit of Merchandise and should have the California bank give Merchandise telegraphic advice to that effect, but Redheffer told Rosenthal that Merchandise wanted "to go along and help him work out the situation" (II, 654-656).

United did not make the arrangement suggested by LeRoy, that is, it did not cause the California funds to be deposited to Merchandise's credit and Merchandise to be given telegraphic advice of that fact (II, 656).

On October 6th LeRoy told Rosenthal that he should arrange that United should not draw on un-

collected funds after October 13th (II, 659). United then asked LeRoy to permit it to continue to draw on uncollected funds until October 18th, and LeRoy with Redheffer's concurrence, told it that it could continue this practice until that day (II, 660-661). On October 18th, the day on which Reichwein returned from his vacation, LeRoy turned the supervision of the account back to Reichwein (II, 662). On October 18th United had not stopped drawing on uncollected funds and so Reichwein on that day and on later days requested Rosenthal to have United stop this practice.

It will be recalled that shortly prior to October 1st, LeRoy instructed Tague to make a special investigation of United with particular reference to its drawing on uncollected funds and to checks on both sides of the account. Reichwein testified that at no time prior to United's collapse on November 17th was he aware that there were checks on both sides of the United's commercial account and that no one ever called this fact to his attention (III, 1017-1021). The testimony is doubtless false. But whether true or false it shows a deplorable situation. If LeRoy when he turned the account back to Reichwein did not advise Reichwein of his suspicions, he was certainly most derelict. Reichwein should have known of the checks on both sides without being advised of the situation by LeRoy. And if he knew of it, whether because he was told by LeRoy or for some other reason, he should have been alerted to the dangers and should have done something to find out what

was going on. But Reichwein did nothing whatever with respect to the account except to give United the same directions which had been given United by LeRoy while Reichwein was on his vacation, that is directions to stop drawing on uncollected funds in its commercial account (III, 1004-1005). But United did not even stop doing this until the end of October (III, 1013); and then as will be stated later, it continued to draw on uncollected funds in enormous amounts by the use of its loan account.

And so the facts are that after Collins had given LeRoy his warning that United might be engaged in a kite and after Tague had made his dubious report, Merchandise did absolutely nothing to investigate the transactions between Lofendo and United giving rise to the checks on both sides; but that all Merchandise did was to direct United on several occasions to stop drawing upon uncollected funds; and that United despite these directions did not stop drawing on uncollected funds in its commercial account until the end of October. And during this time Merchandise was loaning United large sums; and was discounting for United drafts in a substantial amount; and during this time Merchandise had access to United's books and records and was in constant touch with its officers and employees. The only inference which can be drawn from these facts is that Merchandise, at least as early as the middle of October knew, or should have known, that United was engaged in a kite. But other evidence in the record places this fact beyond any doubt.

The records of Merchandise show the facts stated in this and the next two succeeding paragraphs.¹² During September Lofendo's accounts receivable aggregating \$43,305.00 were assigned to Merchandise. During that month the total remittances received by Merchandise from United on account of accounts receivable aggregated \$777,629.89. During that month the total Lofendo remittances represented by checks of Lofendo drawn on the Branch received by Merchandise aggregated \$341,250.30, or about 44% of the aggregate.

During the month of October Lofendo accounts receivable aggregating \$105,718.22 were assigned to Merchandise. During that month the total remittances received by Merchandise from United on account of accounts receivable aggregated \$1,168,029.96; and during that month the total remittances represented by checks of Lofendo drawn on the Branch received by Merchandise aggregated \$899,909.64, or 80% of the total.

During the first sixteen days of November Lofendo accounts receivable aggregating \$434,527.69 were as-

¹²It was stipulated that the schedule marked Defendant's Exhibit GG was a correct schedule of data from the interim and monthly assignments of accounts receivable of United to Merchandise during the months of September, October and November. 1948 (II, 776).

The remittance sheets, which were introduced as Defendant's Exhibits DD to FF, show the remittances received by Merchandise from United during September, October and the first sixteen days of November.

The schedule, Defendant's Exhibit GG, and the remittance sheets, Defendant's Exhibits DD to FF, show the data set out in above paragraph of the text.

signed to Merchandise. During these sixteen days the total remittances received by Merchandise from United on account of accounts receivable aggregated \$1,087,046.62. During these sixteen days the total remittances represented by checks of Lofendo drawn on the Branch received by Merchandise aggregated \$998,326.98, or about 90% of the total remittances.

The fact, therefore, is that Lofendo checks, which were being used as part of the kite, were pouring into Merchandise in constantly increasing and fantastic numbers and amounts.

As already stated, the practice pursued by Merchandise was that on the same day it received a remittance from United it would loan United an amount equalling the remittance and would take a new note to evidence the loan and would credit the proceeds of such loan to United's commercial account. (See the discussions on pages 23 to 26 of this brief.) Merchandise's loans to United, which were related in this way to the Lofendo checks, increased from \$341,250.30 in September to \$899,900.69 in October and to \$998,326.98 during the first sixteen days of November. What sort of banking was this?

Although the Lofendo checks did not create credits in United's commercial account, still under the practice just referred to the delivery of such checks lead to a new loan and the new loan to such credits.

And so United carried on the kite, not only by depositing Lofendo checks to its credit in its commercial account, but also by delivering Lofendo checks

to Merchandise as remittances on account of accounts receivable and at the same time getting new loans which were then credited to its account.

And likewise United was drawing on uncollected funds, not only by depositing Lofendo checks to its credit in its commercial account and drawing on such checks before they were collected, but also by delivering Lofendo checks to Merchandise as remittances on account of accounts receivable and at the same time getting new credits for the loans then made it before the collection of the remittance checks. The uncollected funds on which Lofendo was drawing by the latter method were constantly increasing until on November 15th they had reached the enormous total of \$602,535.61 (II, 776-777).

Another circumstance should be mentioned. Owing to the practice of preposting of in-clearings and delayed posting of counter work, the daily balance appearing in United's commercial account on any given day was not a true balance, but was what was called "a noonday balance" (III, 961). In order to arrive at the true balance for any particular day, it was necessary to add to the noonday balance of that day the sum of all in-clearings posted under that date (III, 962).

During the month of July, there was a noonday overdraft in the commercial ledger of United with Merchandise on eight days; in August on ten days; in September on five days; in October on ten days; and from November 1st to November 16th on five days (deft's. ex. QQ; II, 768); and on each of these

days on which a noonday red balance was posted to United's account (which posting was done on the day succeeding the day as of which the entry was made) it was necessary for United to create credits to its account so that on the day of posting the noonday overdraft would not on that day become an actual overdraft.

Reichwein saw Gassman, the bookkeeper of United, almost every day (III, 977). Gassman would bring in to Reichwein for his approval notes to evidence new loans and drafts of United which he was presenting to Merchandise for discount (III, 978-979).

Whenever there was a noonday overdraft in United's commercial account the fact that there was such an overdraft and the checks creating it would on the day of posting be called to Reichwein's attention for his approval (III, 971-975). And Reichwein would not approve the noonday overdraft unless on that day a new credit had been given United (III, 985-986). These credits arose out of loans made by Merchandise to United or the discount by Merchandise of drafts of United (III, 986-989).

We must infer from these circumstances that whenever a noonday overdraft was posted on the ledger sheet, United would be notified of this fact and that United would then supply the necessary credits to meet the overdraft by securing Reichwein's approval of new notes or drafts.

Now Merchandise cannot excuse itself for the deplorable and fantastic situation which we have just

been describing, by simply saying that it did not know about it. The facts appeared in its record and it was charged with knowledge of what was shown by its records. In a discussion between court and counsel during the trial respecting certain facts shown by Merchandise's records, the court said:

“The Court. They knew about the account. If the bank's records show it, it is knowledge to the bank” (II, 786).

Of course, this is so.

Reichwein testified that when LeRoy told him that LeRoy had told Rosenthal to stop drawing against uncollected funds, LeRoy did not call to his attention “any uncollected activity” except that arising from deposit of checks to the commercial account (III, 1010-1011). He then testified:

“Q. Did you thereafter inquire whether or not there was any uncollected activity, as we have expressed it, in connection with payments being made by the United Produce Company on account of its obligation to the bank?

A. On accounts receivable?

Q. Yes.

A. No, sir” (III, 1011).

But Messenger testified that loaning officers should keep in constant touch with all the records of the bank relating to loans made under their supervision (I, 277-278); that among other things they should observe whether or not a customer is discounting drafts drawn on the same drawee in very large sums of money (I, 278); that, in other words, they should

determine whether or not there is any concentration in the drafts of one drawee (I, 278-280); and then he went on to testify:

“Q. And they should determine whether there is any concentration in the assignment of accounts receivable of any one debtor?

A. They should.

Q. And whether or not there is any concentration in the receipt of payments from any one debtor?

A. They should” (II, 280).

This, of course, goes without saying; but if there were any need for proof of the fact, we have it here in this testimony of Messenger.

Reichwein wanted us to believe that he, like the proverbial ostrich, had simply stuck his head in the sand and knew nothing about the account. But he was the officer of Merchandise in charge of its loan to United; and so he knew, or should have known, of the Lofendo checks on both sides, Collins' warning, and the unsatisfactory Tague report; and he knew, or should have known, of the tremendous concentration of Lofendo checks received as remittances in September; that this large concentration more than doubled in October; and that it increased again in the first half of November. And he should have known that after he asked United not to draw on uncollected funds, it, by making use of the practice we have described, had continued in effect to draw in huge amounts on uncollected funds.

Reichwein was approving the new loans to United (III, 977-979). And so he knew, or he should have known, that Merchandise made new loans to United which were related in the manner we have described to the Lofendo checks, in the following amounts: \$341,250.30 in September; \$899,900.64 in October, and \$998,326.98 during the first seventeen days of November.

The things that went on in Merchandise's office respecting the United account were so flagrantly bad that they could not have been overlooked. It must be inferred, therefore, that Merchandise had knowledge of them. But if it did not actually know about them, it should have known of them. Under circumstances of this sort means of knowledge are the equivalent of knowledge. California Civil Code, sec. 19; 20 Cal. Jur. 234-237, sec. 4.

On November 13th Bank of America wired Merchandise that it was rejecting Lofendo checks aggregating \$57,694.97 because of insufficient funds, and Merchandise received this wire on November 15th, which was a Monday (I, 379-381). These were the first Lofendo checks rejected by the Branch. When Merchandise received this wire, it did nothing with respect to the United account. On November 16th Bank of America wired Merchandise that it was rejecting additional Lofendo checks aggregating \$110,265.04 for the same reason (I, 381-382; II, 718-719). When Merchandise received this wire on November 17th, it called in Rosenthal, the secretary of United,

who then told Merchandise that he had been carrying on transactions which might cause Merchandise a severe loss (II, 718-719). United thereupon collapsed and the kite ended.

When United collapsed Lofendo checks for \$534,-548.18, which had been taken by Merchandise as remittances and which were part of the kite, were outstanding. These checks were never collected. Merchandise took a loss arising out of the kite in the amount of these checks. If the judgment of the trial court stands, Merchandise will have recovered from defendant \$203,047.60 of its loss with interest.

In the light of this record, it is not just that Merchandise should reduce the loss which it brought upon itself by mulcting Bank of America in this amount.

And as we will show later, under the law the fact that it knew, or should have known of the kite, precludes it from recovering.

3. **Bank of America was not negligent in not having discovered the kite; and Merchandise falsely represented to Bank of America United's condition in order to induce Bank of America to continue to pay Lofendo checks.**

Although the trial court made no findings with respect to the issue whether Merchandise knew, or should have known, of the kite, it did find that as early as October 22nd, defendant became suspicious that the Lofendo account was being operated as part of a kite, and that on November 10th, Bank of America became positive that the transactions between Lo-

fendo and United "were not ethical but were part of some dishonest scheme" (I, 105).

The court also found that it is not true that Merchandise ever made any representation to the Bank of America to induce it to pay checks drawn on the Lofendo account to the order of United or to induce Bank of America to give Lofendo credit for checks drawn by United to his order; and that it is not true that Bank of America, in reliance on any representation of Merchandise, ever paid any checks drawn on the Lofendo account or ever gave Lofendo credit for checks of United (I, 113).

Both these findings are erroneous. The record shows without dispute that the Branch was not negligent in not discovering the kite, and that Merchandise by Reichwein's wire of October 20th did make representations to Bank of America to induce it to continue to pay checks of Lofendo drawn on the account and to credit Lofendo with checks drawn to his order by United; that these representations were fraudulent; and that they were relied on by Bank of America.

(a) What took place in the Branch prior to its receipt of Reichwein's wire of October 20th.

Estribou testified that he had been manager of the East Bakersfield Branch of Bank of America for over fifteen years (I, 392-393; I, 205-206); and that his Branch had deposits of about \$20,000,000.00 in 1948. In other words, the Branch was not a small banking operation.

He also testified that Tozzi, a farmer and shipper with a good reputation in the community, introduced Lofendo to Estribou on March 12, 1948, when the Lofendo account was opened (I, 392); that he met Lofendo only once and that was when the account was opened (I, 206); that after Lofendo opened the account Estribou never saw him in the Branch, but just saw him in passing occasionally at lunch (I, 373); that Lofendo was a stranger to him and to the other officers of the Branch (I, 206); that the original deposit which Lofendo made was in cash, but that all of his other deposits came in the mail (I, 207); and that after Lofendo opened the account Estribou had no real contact with him (I, 393); and that Lofendo never borrowed money from the Branch and never applied to the Branch for a loan (I, 393).

Cosgrove testified that he has been the assistant manager of the East Bakersfield Branch since June, 1948 (II, 433); that Tarr was the operations officer of the Branch (II, 433); that while Tarr was on his vacation during the period from October 11th to October 18th, Cosgrove had occasion to observe the Lofendo account (II, 433-434); that pursuant to the practice of the Bank the bookkeeper called to his attention the fact that a large number of checks in large amounts were being deposited and being checked out (II, 434); that he then took a look at the account and found that checks payable to United were being drawn on the account and checks drawn by United were being deposited to the credit of the account (II, 434), and that the Bank was paying checks

drawn on the account before checks deposited had a chance to clear (II, 435); that he thought these circumstances required explanation (II, 434-435); that when Tarr returned from his vacation Cosgrove told him what he had discovered about the account (II, 434); that Tarr said that he would wire Merchandise regarding United (II, 440); that the response Tarr got from his inquiry was Reichwein's wire to Tarr of October 20th (Deft's Ex. 0); and that he saw this wire either on the day it was received or the day following (II, 440; II, 440-441).

Estribou testified that the Lofendo account was brought to his attention by Tarr; that he then learned that checks of the United were being deposited to the credit of the account and checks payable to the United were being drawn on the account (I, 361-362); that because of the size of the checks and the activity in the account he considered this a most unusual situation (I, 362); that he then instructed Tarr to make inquiry of Merchandise respecting the standing of the United (I, 385-386); that when the wire of October 20th from Merchandise was received, it was shown him (I, 386); that Tarr later told him that he had contacted the Fresno Branch as suggested by the wire; and that Tarr did not tell him in detail what he had learned from the Fresno Branch, but that Tarr did tell him that it was along the same lines as the wire, that United had a good record (I, 387).

(b) Reichwein's wire of October 20th; the wire made representations to Bank of America which were fraudulent.

Reichwein's wire to Tarr of October 20th said in part:

"* * * we loan them legal limit on secured basis. Net worth of company over eighty thousand dollars. Impossible for us to set limit on acceptance of their checks. Up to present have never returned any checks. Suggest you contact your main branch at Fresno, California, who have complete information."

Tarr thereupon telephoned the Fresno Branch and asked Nelson, the man there with whom he talked, for information on the credit responsibility of United (II, 574-575). Nelson then read to Tarr over the telephone a letter, dated September 22nd, defendant's exhibit Q, which Merchandise had written the Fresno Branch (II, 577-578). Reichwein testified that when his wire of October 20th suggested that Tarr ask the Fresno Branch for information, he referred to this letter (III, 992-993).

This letter stated that United was well and favorably known to Merchandise; that United had a very satisfactory account with it in which United maintained balances averaging five figures; that Merchandise was loaning United up to its legal limit of \$200,000.00 under special arrangements and had found that United made proper use of the commitment; and that United was making progress from the standpoint of operations (IV, 1272-1273).

Much of the information given by the wire and obtained from the Fresno Branch pursuant to the suggestion made by the wire was completely false. The letter says that United was maintaining "balances averaging in satisfactory five-figure proportions"; but as we have already pointed out there were frequent noon day overdrafts which would have been actual overdrafts on the days on which such overdrafts appeared if not met by additional loans or discounts. The letter says that United was making "proper use" of the loan being made to it; but it was not; at the very time when the wire of October 20th was sent Lofendo checks in tremendous amounts were pouring into Merchandise as remittances on account of accounts receivable which certainly did not indicate a proper use of the commitment. The letter says that "the company is making progress from the standpoint of operations". But a company which has frequent noon day overdrafts and is drawing heavily on uncollected funds and is making remittances on account of pledged accounts receivable of one debtor in extremely large amounts, is not making progress from the standpoint of operation. And the letter says that Merchandise has "come to entertain a favorable regard for the account"; but in view of what had occurred respecting the account from the time Collins started his investigation to the date of Reichwein's wire Merchandise could not possibly have entertained such a regard for it.

We cannot conceive how Reichwein could have been unaware that the information he was giving Bank of

America was false. But even if he believed what he told Bank of America, he would still be guilty of making false representations. The law is that where a party makes a representation without reasonable ground for believing it to be true, he is just as guilty of fraud as though he knew his representation was false. Sec. 1572 of the California Civil Code.

What could have prompted Reichwein to send the wire of October 20th? It is impossible to believe that he and the other officers of Merchandise were being completely hoodwinked. The evidence of the fraud was right under their noses; one can say that their noses were being rubbed in it.

(c) What took place in the Branch after receipt of Reichwein's wire of October 20th. Bank of America relied on this wire.

After Tarr had received the wire, Estribou did not terminate the Lofendo account, but he gave instructions that the Branch should not accept for immediate credit checks of United being drawn to the order of Lofendo until Lofendo could be contacted and his methods of operation discussed (Tarr's memo of October 22nd, pltf's. ex. 12; IV, 1174B, and II, 562, 579-580). At that time Tarr placed a "hold" on the Lofendo account, that is he arranged that the Branch upon receiving checks for deposit in the Lofendo account should give Lofendo credit for them, but should not pay checks against such credits until the checks credited to the account had an opportunity to clear (II, 563; 581).

After Estribou had given these instructions, Tarr made an effort to contact Lofendo and as a result of this effort towards the latter part of October, Lofendo and Rosenthal appeared at the Branch and conferred with Cosgrove (II, 572-573; 580). Cosgrove told Lofendo and Rosenthal that his Branch wanted Lofendo to give checks deposited to his account a chance to clear before he drew checks against them; that the Branch wanted Lofendo to maintain a larger balance in the account; and that it wanted an explanation of the checks payable from Lofendo to United and from United to Lofendo (II, 436-437). Rosenthal there-upon explained these checks to Cosgrove by telling him in effect that when United made a purchase for Lofendo's account, Lofendo would give it a check for the amount and that United would then sell the produce and give Lofendo a check for the proceeds (II, 437). Cosgrove then told Rosenthal that he wanted a letter from United giving this explanation so that the Branch would have a record in its files that the transactions between Lofendo and United giving rise to the checks on both sides were bona fide purchases and sales (II, 438). Rosenthal replied that he would give the Branch such a letter (II, 438-439). Cosgrove then told Estribou and Tarr what had been stated in the conversation and that he was satisfied (II, 438; I, 388-389). The account was then carried on substantially as it had been previously (I, 388-389).

Merchandise argues that the fact that Estribou gave his instructions to Tarr of October 22nd and the fact that Tarr brought Lofendo and Rosenthal

into the Branch to hear their explanation shows that Bank of America did not rely upon Reichwein's wire of October 20th and the information obtained from the Fresno Branch. The contention is clearly untenable. When Tarr on October 20th called the account to Estribou's attention, Estribou was called upon to take some action. The account struck him as an unusual operation. He could either have terminated it or let it continue. There was no reason for him not to terminate it. Lofendo was just a depositor of the Branch and a stranger to its officers. The Branch had not made him any loans. There can be no doubt that Estribou in not terminating the account, but in permitting it to continue relied on the excellent character given United by Reichwein's wire of October 20th and the letter of September 22nd; but at the same time he as a prudent banker wanted to know more about the account.

To test whether Estribou relied on Reichwein's wire, let us assume that the wire had stated just part of the truth, a relatively small part. Let us assume, for example, that the wire had stated that there were frequent noon day overdrafts in the United account which could only be met by plaintiff making United additional loans; that at the end of September an officer of Merchandise had made a cursory examination of the account and had noticed the checks on both sides and that United was drawing heavily on uncollected funds; and that Merchandise then, after its auditor had made an investigation, had requested

United to stop drawing on uncollected funds, but that United still persisted in doing so. This would only have been a small part of the truth; but there can be no doubt that if Reichwein had sent such a wire to the Branch, Estribou would have terminated the account immediately. This demonstrates, if demonstration be required, that the Branch by continuing the account relied upon the wire.

37 C. J. S. 287 states:

“It is not essential to redress [for fraud] that a representation or concealment should have been the sole cause of action, but it is sufficient if it constituted one of several inducements and exerted a material influence.”

After the lapse of about ten days following Cosgrove's discussion with Rosenthal and Lofendo, Cosgrove and Tarr again discussed the account before the officers' meeting of the Branch on November 10th (II, 438). Tarr told Cosgrove that the account had not improved and Cosgrove informed Tarr that the letter for which he had asked Rosenthal had not been received and that he believed that the account should be discussed at the officers' meeting (II, 438-439). The account was then discussed at a meeting of the officers of the Branch on November 10th; and at this meeting Estribou gave instructions that when Lofendo deposited checks he should not be given credit for them, but that the checks should be sent on for collection (I, 366; 389-390; and Tarr's memo of November 15th, plt's. ex. 13; IV, 1174C).

As already stated, on November 12th the Branch rejected its first group of Lofendo checks for \$57,-694.97 because of insufficient funds, and on November 16th, it rejected another group of Lofendo checks for \$110,265.04 for the same reason.

The finding of the trial court, that on November 10th Bank of America became positive that the transactions going on between Lofendo and United were not ethical, was based on Estribou's testimony. But Estribou's testimony is that it was not until after the Branch rejected the second group of checks that he became positive that something wrong was going on in the account. On direct examination by Merchandise's counsel, he stated:

“Q. On November 10th, ten days afterwards, when you made this new insistence that items be taken for collection only, it is a fact, is it not, that you then became positive, if you had not been theretofore so, that the operations between United and Lofendo were not ethical?

A. I was not positive, no. That is what we were trying to determine by having them come in there.

Q. If you were not positive, you felt very strongly about it, that it was not ethical?

A. I still wanted to be safe rather than sorry” (I, 369).

His attention was then called to Bank of America's wire to Merchandise of November 13th notifying Merchandise of the rejection of the first group of checks. And he was then asked:

“Q. Is it a fact that on this day, November 13th, you were almost positive that something was going on that was not ethical between Lofendo and United Produce Company?

A. Yes, we suspicioned that, yes.

Q. This is your testimony, is it not?

A. That is correct, yes.

Q. Did anything happen between November 10th, when you gave positive instructions that Lofendo items were to be taken for collection only, and November 13th, to increase your suspicion, or was your frame of mind the same on November 10th as it was three days later?

A. It is pretty hard to answer that question, between the 10th and the 13th. That is a long time ago (I, 372-373).

Q. Yes, and your state of mind about the unethical quality of the transactions between Lofendo and United Produce was just the same on the 10th as it was three days later, was it not?

A. I think so” (I, 373).

Then on cross-examination by Bank of America’s counsel his attention was called to certain testimony given by him in his deposition to the effect that he first suspected a check kiting operation after he received telephone calls from various parts of the United States indicating that United had a large amount in checks “floating around with no funds to meet them” (I, 382). He then testified that these telephone calls were received in the week commencing on November 15th (I, 383); and he then testified:

“Q. Now can you say, Mr. Estribou, with reference to these telegrams and these phone calls and the testimony that I have read to you, can you give us approximately the date when you first suspected that a kiting operation was going on? That is, felt ethically—felt that something ethically wrong was going on? When did you first suspect that, when did you first feel that?

A. Well, right after we returned these checks.

Q. Which checks?

A. His checks—Lofendo’s checks.

Q. Well, with reference to these wires, can you give approximately the date when you had that feeling that something ethically wrong was going on?

A. Oh, I would say it was around the 13th, 14th, in there” (I, 383-384).

Estribou also testified:

“Q. In other words, Mr. Estribou, you do not charge a man with fraud, kiting, or anything else unless you have some proof that that is what he is doing, is that right?

A. That is correct.

Q. On November 10th you did not have any proof of that sort with respect to this account?

A. None whatsoever” (I, 391).

And it is a fact that on November 10th Estribou had no such proof. On that date, the only thing that had occurred adverse to Lofendo which had come to the notice of the Branch was that Lofendo had not supplied the Branch with the letter which Cosgrove had requested. But this circumstance was not of such a serious import as to lead the Branch to believe that

Lofendo and United were engaged in a fraudulent kiting operation, particularly in view of Reichwein's wire to Tarr of October 20th, and the information which pursuant to Reichwein's suggestion Tarr had obtained from the Fresno Branch. It was not until checks began "to bounce," not only at the Branch, but elsewhere, that Estribou and the others at the Branch could conclude that there was something wrong going on.

It was Cosgrove, not Estribou, who had handled the matter. And Cosgrove testified:

"Q. When you left on your vacation, on November 13th, did you suspect or believe that the United Produce Company and Lofendo were engaged in a kiting operation?

A. No, sir" (II, 443).

We submit that the trial court's findings that Bank of America became suspicious of a kite on October 22nd and positive of it on November 10th is not supported by but is contrary to the evidence and is therefore erroneous, and that the same thing is true of the trial court's findings that Merchandise made no representation to Bank of America to induce it to pay checks drawn by Lofendo on his account.

4. **Regardless of whether or not Bank of America was negligent in not having discovered the kite, the fact that Merchandise knew of the kite, prevents its recovery. And so the issue whether Merchandise had such knowledge, was material.**

(a) The law is that "A mistake which authorizes recovery exists only when the payor is unconscious of any error or ignorance * * *" 70 C. J. S. 369, sec. 157(b). See also the Restatement, Restitution, sec. 6.

This must be so because if the payor knows the facts, then he is not laboring under a mistake and so has no ground on which to recover.

In substance Merchandise maintains that the mistake it made which justifies its recovery consisted in its erroneous belief that its transactions with United giving rise to the credits to United's account against which the checks were charged were bona fide transactions, whereas in fact they were part of the kite.

As the trial court made no findings with respect to the issue whether Merchandise knew of the kite, it must, as we have stated, be assumed on this appeal that it had such knowledge. And the record we have reviewed shows that it did in fact have such knowledge.

It follows that as it was not laboring under the mistake on which it must base its claim, it cannot recover. And this, of course, is true whether or not Bank of America was negligent in not discovering the kite.

(b) The textwriter in 40 Am. Jur. 848, sec. 194, says:

“* * * and it has been held that an action for the recovery of money will not lie where money has been paid by a mistake which arose from the fault or negligence of the party paying, and cannot be recovered without prejudice to the party who has received it.”

The same principle is stated in effect in the Restatement of Restitution, sec. 142, pages 567, 568-569, and 573-574. We quote the following short extract:

“Any change of circumstances which would cause or which would be likely thereafter to cause the recipient entire or partial loss if the claimant were to obtain full restitution, is such a change as prevents full restitution if the recipient was not guilty of a tort nor substantially more at fault than the claimant. * * *”

The rule, therefore, is that if the mistake inducing the payment was due to the negligence of the payor and if its recovery will cause the payee prejudice, the payor cannot recover.

The mistake of Merchandise which induced its payments of the checks was its belief that the Lofendo checks delivered to its as remittances in connection with which it made loans to United were bona fide, whereas in fact they were part of the kite. Assuming that Merchandise did not actually know that the kite was going on, its mistake was certainly due to its gross negligence.

In *Citizens State Bank v. Western Union Telegraph Co.*, 5 Cir., 172 F. (2d) 950, the court held that the bank could not recover from the telegraph company an overdraft in the latter's account, because the overdraft was due to a kite which the bank negligently allowed an employee of the telegraph company to carry on. The court said, at page 952:

“* * * But for the inexcusable conduct of the bank in permitting, if not encouraging, and in part inducing, the system of continuous kiting of checks which went on for so long, no substantial loss could have occurred. Had the bank acted in good faith, had it exercised the slightest dili-

gence, it would have put a stop at once to the remarkable goings on between McGuire and Frase, and at once notified plaintiff of them. Had it done so, the wrong doing would have been stopped in its beginning, and no loss would have occurred."

Paraphrasing this statement we can say that if Merchandise had acted in good faith, if it had exercised the slightest diligence, "it would have put a stop at once to the remarkable goings on" between United and Lofendo, and it would not have made the mistake it did make in paying the checks.

If Merchandise is permitted to recover, Bank of America, as a result of the kite, will have taken a loss of \$174,192.34. This, of course, will constitute serious prejudice.

As we have seen, Bank of America's position was changed by the Merchandise's payments of the checks. But if we assume for argument's sake that it was not, still Merchandise's mistake in paying the checks was due at the very least to its gross negligence; and if it is allowed to recover Bank of America will suffer serious prejudice; and so under the rule of the authorities we have cited Merchandise cannot recover.

And this is so whether or not Bank of America was negligent in not discovering the kite.

In *Bank of America v. Universal Finance Co.*, 131 Cal. App. 116, 126, 21 P. (2d) 147, 151, the court said:

"* * * where one of two innocent parties must suffer, the burden should be borne by the one whose action was the primary cause of the loss."

And in *United States v. First National Bank*, 10 Cir., 124 F. (2d) 484, 488, the court said:

“* * * as between two innocent persons, both of whom are victims of fraud, the burden must fall upon the one whose negligence first facilitated and made possible the loss.”

See also: Restatement, Restitution, section 142, quoted from above, and 18 Am. Jur. 335-336.

Merchandise was lending United large sums and discounting United's drafts in large amounts; it was in constant touch with United's employees and officers; it was making periodical examinations of United's books and was familiar with its affairs; and yet it permitted United to engage in the practices which we have described and which the slightest investigation would have disclosed. Whereas Lofendo used the Branch merely as a depository; he never applied to the Branch for a loan and was practically a stranger to its officers; and when the Branch inquired of Merchandise as the bank financing United respecting its character and financial responsibility, Merchandise replied by fraudulently misrepresenting these things to the Branch. If it be assumed that Merchandise did not know of the kite but was only guilty of negligence in not having discovered it, there can be no doubt that its acts were the primary cause of the loss.

5. A summing up of the discussion under this heading H to this point.

The evidence shows without conflict that Merchandise knew, or should have known, of the kite; and

in view of the trial court's failure to find respecting the issue, it would have to be assumed for the purpose of this appeal that Merchandise had such knowledge if such knowledge would be a defense to this action.

There can be no doubt that it is a defense and that therefore the failure of the trial court to find respecting the issue is reversible error.

It is a defense for these reasons: First, as Merchandise knew that the kite was going on, it was not laboring under the mistake upon which it bases its right to recover. Second, as Merchandise at the very least was guilty of the grossest negligence in making the payments, and as Merchandise's recovery of them will cause Bank of America serious prejudice (a loss due to the kite in the sum of \$174,192.34, with interest), Merchandise cannot recover.

6. **As Merchandise knew or should have known of the kite, it will be liable to Bank of America under defendant's counterclaim in the event it is held that Merchandise is entitled to recover in this action. And so the issue whether Merchandise had such knowledge was material.**

All those participating in a fraud are liable for the damages suffered by the injured party. *Swasey v. de L'Etanche*, 17 Cal. App. (2d) 713, 718, 62 P. (2d) 753, 755; *State v. Day*, 76 Cal. App. (2d) 536, 550, 173 P. (2d) 399, 407-408.

There can be no doubt that if Merchandise knew of the kite and permitted it to go on, it was in effect participating in the fraud being perpetrated by United and Lofendo on Bank of America.

Bank of America's counterclaim, therefore, was sound; and so the issue of Merchandise's knowledge of the kite was material; and the trial court's failure to find respecting it was reversible error.

I. THE TRIAL COURT'S FINDINGS THAT BANK OF AMERICA ENTERED INTO A CONTRACT THAT IT WOULD NOT ACT UPON THE ADVICE OF CREDIT WITH RESPECT TO THE SIX CHECKS WHEN RECEIVED IS NOT SUPPORTED BY THE EVIDENCE; BUT SUCH AGREEMENT, IF MADE, WAS VOID AND UNENFORCEABLE.

1. These findings are not supported by the evidence.

The findings are that on November 17th Merchandise telephoned Bank of America and informed it that the advice of credit respecting the six checks had been sent out by mistake and as a result of a fraud perpetrated by United; that Merchandise, upon being informed by Bank of America that this advice had not yet been received, "informed defendant that the advice of credit had been rescinded and revoked"; that in the conversation "defendant agreed with plaintiff not to act upon the advice of credit if and when it should be received and agreed to return it to an emissary of plaintiff"; that on the next day, November 18th, Merchandise advised Bank of America that the "advice of credit had been sent out by mistake, that it was rescinded and revoked * * *"; and "that on the same day defendant agreed that it would not act upon the advice of credit when received" but would return it (I, 101-103).

The findings with respect to the telephone conversation of November 17th are based on the conversation of Messenger and Estribou of that day; and the findings with respect to what occurred on November 18th are based on the conversations between LeRoy and Duncan and Johnson of that day.

Messenger testified that after Rosenthal had come into Merchandise's office on November 17th and had talked to Redheffer and Reichwein, he was later told what Rosenthal had said in this conversation; and that he then looked into the United's account and telephoned Estribou (I, 215-217). He then testified that in his telephone conversation with Estribou he told Estribou that United had perpetrated a fraud on Merchandise, and that one of its officers had admitted that it had pledged fraudulent accounts as collateral to Merchandise (I, 220-221); that he had a list of checks received from Lofendo and wanted to ascertain whether or not any of these checks had been paid (I, 221); and that Estribou then called off the checks which Estribou's record showed had been paid and that he checked off the items on his list (I, 222-223).

Now we can come to the crux of his testimony which was as follows:

"A. * * * I told him [Estribou] that on November 15th we had mailed an advice of credit covering a collection of six checks of Frank C. Lofendo forwarded to us by their branch, totaling \$113,216.50, and that the advice of credit had been sent out in error. I asked him whether or

not the advice had been received by him. He told me that the advice had not been received by him. I told him that it was our desire that their bank not make any entry on that advice of credit as we were rescinding the credit, and Mr. Estribou told me that he would be happy to work with Merchandise National Bank; that in so far as the Lofendo account was concerned, they had not been paying against uncollected funds, they were in the clear; they had a balance of \$699.02. He stated that they would work with us; they would do anything we wanted them to do; they would pay checks that we would present to them for payment or they would not make entry whichever we desired. * * * I informed Mr. Estribou that that it was not our desire that they pay checks, but we were rescinding the advice of credit; the Merchandise National Bank didn't want them to make entry on the credit. Mr. Estribou said 'I agree with you; then we won't make entry.' * * * I told Mr. Estribou that Mr. LeRoy, one of our vice-presidents, was flying out to California that night and that he would be in Bakersfield the following day and that it was our desire that he deliver to Mr. LeRoy the advice of credit that we had rescinded'' (I, 223-225).

Estribou testified that in the telephone conversation he told Messenger that he could not comply with Messenger's request not to enter the credit; that he had no right not to enter it; but that he assumed Messenger was in trouble and he would be happy to do anything he could to assist Messenger and his bank, provided it did not cost his bank anything;

and that if Messenger had checks from Lofendo and sent them out to the Branch and the Branch had a balance, he would give Merchandise preference (I, 396-398).

The resolving by the trial court of this conflict against Bank of America is, of course, binding on Bank of America in this appeal.

In 17 *C.J.S.* 387-388, the textwriter says:

“Offer and acceptance, to be effective in creating a contract, must manifest an intention to affect legal relations between the parties.”

Broad Street National Bank of Trenton v. Collier, 112 N.J.L. 41, 169 Atl. 552, was a suit on a promissory note brought by plaintiff bank against defendant accommodation endorser. Plaintiff bank had had in its hands \$10,000.00 belonging to the maker of the note. Defendant, knowing this, had written plaintiff bank requesting it to “take care of me,” that is apply the \$10,000.00 on the note. Plaintiff bank replied “shall be very glad to comply with your wishes.” The court held that the correspondence did not create a contract binding plaintiff bank to apply the \$10,000.00 on the note. It said at pages 553-554:

“An offer, to constitute a contract, must be one which is intended of itself to create legal relations on acceptance. 6 R.C.L. p. 600. The agreement must purport to produce a legally binding result, or, to put it in another form, the intention of the parties must refer to legal relations. It must contemplate the assumption of legal rights and duties. 13 C.J. 286. An offer is a

statement by the offeror of what he will give in return for some promise or act of the offeree. As the offeror's statement necessarily looks to the future, it must always be promissory in terms. I Williston on Contracts, 30. An expression of desire or hope is not of itself an offer which will become a contract upon acceptance by the adversary party. * * *

A declaration of intention to act in a certain way, which does not show that the party who makes such declaration promises to act in such way, or intends to incur a legal liability obliging him to act in such way, is not an offer which can be accepted so as to make a contract. If it is sought to make an offer which, on acceptance, can become a contract, the words or acts by which it is made must show intention to assume liability. 1 Supp. Page on Contracts, secs. 77, 79.

The offer and acceptance must have the characteristics of a binding bargain. Such was not the case here. Appellant, in the letter referred to, merely expressed the hope that his note would 'be taken care of.' He was seeking the aid and assistance of Mr. Wicoff, and the latter expressed a willingness to help, but it is evident that it was not in the mind of either party that their legal relations were to be affected by a binding contract."

Accepting Messenger's version of the conversation as correct, the question is does it show an intention on the part of Messenger and Estribou to alter the legal rights and duties of the banks; or to put the

point in another way did Messenger make an offer and did Estribou accept it, all for the purpose of creating a binding contract between the banks? "An offer is a statement by the offeror of what he will give in return for some promise or act of the offeree." Did Messenger state that Merchandise would give something in return for some promise or act of Bank of America?

Just before Messenger telephoned Estribou he had been told that Merchandise was to take a loss because of United's fraud. He telephoned Estribou to find out how many of the Lofendo checks had been paid; and he then told Estribou, according to his testimony, that Merchandise had sent out the advice of credit in error; that it did not want the Branch "to make any entry on that advice of credit as we were rescinding the credit"; that "it was not our desire that they pay checks, but we were rescinding the advice of credit"; and that Estribou replied, "I agree with you; then we won't make entry."

Messenger did not telephone Estribou to negotiate a contract. Messenger telephoned Estribou to give him instructions; to tell him that Merchandise was revoking the advice of credit because it was paid in error and that Estribou should not credit it to the account or pay checks against it; and, according to his testimony, Estribou said that he would follow the instructions. Messenger made no offer to give something in return for some act or promise of Bank

of America. He made no offer at all; and Estribou accepted none. The conversations had none of the characteristics of a binding bargain. There was no intention to create a contract and none was created.

Nor did the conversations of November 18th between Leroy on the one hand and Duncan and Johnson on the other give rise to a contract.

For the purposes of this appeal we must accept LeRoy's versions of these conversations.

LeRoy testified that when he saw Duncan in the office of Bank of America in the morning of November 18th he told Duncan that Merchandise had been swindled and had suffered a heavy loss in the United transactions (II, 480-481); that he had with him a list of the Lofendo checks, the fate of which he wanted to learn (II, 483); that after Duncan had telephoned Estribou in his presence, Duncan told him that the Branch had a credit balance of approximately \$690 (II, 452-455). Then LeRoy testified:

“Q. Was anything said in either of the telephone conversations [Duncan's telephone conversation with Estribou] about the advice of credit?

A. Yes. Mr. Duncan in both of them told them that it had been revoked and that the head office was familiar with the fact. In the first one he did not say they concurred with it, but in the second he said—I wouldn't say definitely that he said he concurred with it but he said it had been revoked.

Q. Was anything said about what was to be done with it, the physical disposition?

A. It was to be returned to me.

Q. To you when?

A. When I went to Bakersfield the next day”
(II, 456-457).

LeRoy also testified that Duncan wanted to consult with Johnson, as one of the attorneys for Bank of America, to learn whether Bank of America could return the Lofendo checks in which LeRoy was interested without their actual presentation to the Branch on which they were drawn (II, 485-486); that he and Duncan then went to Johnson’s office (II, 486); that Johnson stated that his opinion was that Bank of America could return the checks without their presentation, provided Bank of America was authorized by Merchandise to do so (II, 483-487) and that LeRoy then told Johnson that one of Merchandise’s clerks had mailed the advice of credit by mistake (II, 484-485; 487-488).

Then LeRoy testified:

“Q. Mr. LeRoy, did you tell Johnson at that time that the Merchandise Bank wanted to revoke that advice of credit?

A. I said we had revoked it.

Q. You said you had already revoked it, is that right?

A. Yes, sir” (II, 487-488).

“Q. When you asked Duncan and Johnson, and when you discussed with them the revocation of the credit, you were asking them also for the help of the Bank of America?

A. In the return of the advice of credit but not in the revocation of it. That had already been done.

Q. When?

A. On the afternoon that Mr. Messenger telephoned to Mr. Estribou" (II, 492-493).

LeRoy then went on to testify that after some discussion Johnson said that Merchandise was "entirely within its rights in revoking this credit" and that he (Johnson) wanted to telephone to Estribou because Bank of America would pay "against that credit at their peril" (II, 459).

After these conversations LeRoy signed and delivered to Duncan a letter to Bank of America, dated November 18th, which had been prepared in Bank of America's office (II, 496-497). This letter (pltf's. ex. 10; IV, 1171-1173) states that Merchandise authorizes Bank of America to return without protest the Lofendo checks, the fate of which LeRoy wanted to determine; and then it goes on to say that on November 15th Merchandise received a collection letter from Bank of America accompanying the six checks; that the six checks "are not being accepted by us and will be returned to" the Branch; and "this letter will serve as your authority to return our credit advice which was sent to you in error * * *" (IV, 1171-1172).

In his conversations with Duncan and Johnson, LeRoy took the position that one of Merchandise's clerks had mailed the advice of credit by mistake;

that for that reason Merchandise had revoked the advice of credit; and that he in his conversations with Duncan and Johnson was not requesting that Bank of America consent to the revocation of the credit, but was only confirming the fact that it had been revoked.

As in the case of the conversations between Messenger and Estribou, the conversations between Le-Roy and Duncan and Johnson had none of the characteristics of a binding bargain. There was no intention to create a contract and none was created.

It follows that the findings of the trial court, that on November 17th and again on November 18th Bank of America agreed with Merchandise not to act upon the advice of credit, are not supported by the evidence and are erroneous.

2. Assuming a contract, it was invalid because not supported by a consideration.

If Messenger's conversation with Estribou or Le-Roy's with Duncan and Johnson did create a contract, what was it?

According to Merchandise, it was a contract which would bring about what it desired, that is, a contract under which it was agreed that Merchandise's payment of the six checks should be rescinded and that Bank of America should not credit the amount of this payment to the account but should give up whatever rights it might have therein and repay it to Merchandise.

Merchandise had the burden of establishing the consideration for the alleged contract. 17 C.J.S. 1220-1222. But Duncan testified that Bank of America received nothing in the transaction (II, 553). LeRoy testified that he did not offer or promise anything to Bank of America for its alleged contract (II, 494-496). And the evidence shows that Bank of America (the promisor) received no benefit, and Merchandise (the promisee) suffered no prejudice, as an inducement for Bank of America's alleged promise. Therefore it was not supported by a consideration and is invalid. Secs. 1605 and 1550 of the California Civil Code and 6 Cal. Jur. 164-167, secs. 114 and 115.

3. Assuming a contract, it was invalid because based on mistake.

Messenger testified that in his telephone conversation with Estribou, the latter said that the Branch had not been paying against uncollected funds and that it was in the clear, that it had a balance of \$699.02 (I, 225).

LeRoy testified that Duncan after talking with Estribou on the telephone told him that Estribou had reported that there was a credit balance of about \$690 in the Lofendo account (II, 455). Duncan testified that he had a telephone conversation with both Estribou and Tarr, but that he talked principally with Tarr; and that he told LeRoy that Tarr had informed him that the Lofendo account was "in the black" and that the Branch would not take any loss on the account (II, 541-555).

LeRoy testified that when he was talking with Duncan and Johnson, Johnson telephoned Estribou (II, 491); and that he could not recall distinctly whether Johnson asked Estribou the status of the Lofendo account, but that his best recollection was that Johnson probably did (II, 492). Johnson testified that in this telephone conversation, Estribou told him that there was a credit balance in the account (II, 696).

And so the evidence is uncontradicted that Estribou talked to Messenger and Duncan and Johnson talked to LeRoy on the basis that there was a good credit balance to Lofendo's account.

But as already stated, on November 15th the Branch by mistake gave Lofendo credit for the checks for \$97,207.00 upon the deposit of these checks in the Branch and before their collection and it did not discover this mistake until it received the wire from the Continental Illinois late in the afternoon of November 18th that the checks had been rejected (IV, 1177-1179; I, 374-375). And as already stated, at the close of business on November 17th, Lofendo had drawn against these uncollected funds in the sum of \$82,281.74 and so was indebted to the Branch in that amount. The advice of credit for the six checks arrived at the Branch on November 19th (IV, 1177); and on that day the Branch credited the amount of the checks to the Lofendo account and debited the checks for \$97,207.00 against it (IV, 1179). And

on November 20th the Branch refused to deliver the advice of credit to LeRoy and charged the six checks against Merchandise's account (II, 461-466; I, 175-180).

In short, the evidence shows without conflict that if the alleged contract was made, (a) it was made in the mistaken belief of both Merchandise and Bank of America that there was a good balance to the credit of Lofendo when in fact Lofendo was overdrawn in the sum of \$82,281.74; and (b) when Bank of America discovered its mistake, it rescinded the contract.

It is perfectly obvious that if Bank of America had not believed that there was a good balance to Lofendo's credit and had known that he was overdrawn in the sum of \$82,281.74, it would never have entered into the alleged contract providing that Merchandise could rescind the payment of the six checks and recover it back. Men just don't behave that way.

Bank of America had the right to rescind the alleged contract on the ground of mistake. California Civil Code, secs. 1567, 1568, 1577 and 1689. Sec. 1567 provides that "consent is deemed to have been obtained by" mistake "only when it would not have been given had such cause not existed". It cannot be doubted that Bank of America would not have consented to the alleged contract but for its mistake.

The subject matter of the alleged contract was the Lofendo account. The question was whether Bank

of America should credit the amount of the six checks to that account or agree not to do so. Therefore Bank of America's mistake respecting the status of that account "affected the substance of the whole transaction". The mistake therefore was of the sort which justified a rescission. *Hannah v. Steinman*, 159 Cal. 142, 146-149, 112 P. 1094, 1096-1097.

4. Assuming a contract, it was invalid because induced by Merchandise's fraud.

In their telephone conversation, Messenger told Estribou that the advice of credit had been sent out in error (I, 223); and in their conferences, LeRoy told Duncan and Johnson that one of Merchandise's clerks had mailed the advice of credit by mistake when it should not have been mailed (II, 484-485); that it had been sent out in error because the six checks had been charged against fictitious credits (II, 487).

Neither Messenger's statement nor LeRoy's was true. As we have seen, when Merchandise in paying the six checks charged them against United's account, there was a good credit balance in the account consisting mainly of the proceeds of loans made by Merchandise to United and evidenced by United's notes. Merchandise's error did not consist in sending out the advice in error, or in charging the checks against fictitious credits, but in making United the loans which were then credited to its account.

Messenger and LeRoy not only made these untrue statements to Bank of America to induce it to enter

into the alleged contract, but they also failed to disclose to Bank of America facts which they were under a duty to disclose.

Section 1710 of the California Civil Code provides that deceit is "the suppression of a fact by one * * * who gives information of other facts which are likely to mislead for want of communication of that fact". And in *American Trust Co. v. California Western States Life Insurance Company*, 15 Cal. (2d) 42, 98 P. (2d) 497, the court said at page 65:

"Regardless of whether one is under a duty to speak or disclose facts, one who does speak must speak the whole truth, and not by partial suppression or concealment make the utterance untruthful and misleading. This doctrine is declared by our Civil Code (sec. 1710, subd. 3), and is everywhere recognized as a sound rule of law."

See also, 37 C.J.S. 245-246.

When Messenger and LeRoy spoke, they were at the least under a duty to advise Bank of America that Merchandise by its negligence had permitted United to continue the kite and that it was asking Bank of America to agree to a rescission of the payment of the six checks in order to reduce the losses which Merchandise was to take by reason of the kite. If they had said this and if at the same time they had said what they testified they said (that is, that Merchandise was rescinding the advice), there is every reason to believe that the others would not have responded as Messenger and LeRoy say they responded (that is, by stating in effect that they

would accept the direction that the advice had been rescinded); but that they would have taken the position that under such circumstances they would not accept such direction, but would await developments.

5. Conclusion with respect to this point.

The evidence shows without conflict that there was no intent on the part of anyone to enter into a contract providing that Merchandise's payment of the six checks should be rescinded and that Bank of America should surrender whatever rights it might have in the payment and restore it to Merchandise. And no such contract was made.

But assuming that such a contract was made, it was invalid because not supported by a consideration and because induced by mistake and fraud.

J. RECAPITULATION.

Merchandise paid the checks; and when it paid them and pursuant to the collection letters credited Bank of America, Bank of America ceased to be the agent and Merchandise the sub-agent for their collection; and thereupon Merchandise became indebted to Bank of America and Bank of America to Lofendo in the amounts of the payments.

Merchandise cannot recover from Bank of America the former's payments of the four and six checks upon the ground of mistake, because Bank of America had a lien on the proceeds of the checks and is

therefore in the position of a bona fide purchaser; and because Merchandise received a substantial benefit from the payments of the checks and, therefore, in equity and good conscience is precluded from recovering them.

In addition Bank of America became a bona fide purchaser of the payment of the four checks and entitled to return such payment for the reasons summarized on pages 68 to 69 of this brief; and it acquired the same position with respect to the payment of the six checks for the reasons stated on pages 69 to 72 of this brief.

The issue raised by Bank of America's answer, that Merchandise knew or should have known of the kite, was a defense to the action and therefore the trial court's failure to find with respect to this issue is reversible error. It constituted a defense for the reasons summarized on pages 106 to 107 of this brief. And the court should have found respecting it because it was an essential element of Bank of America's entirely proper counter-claim.

No contract for the rescission of the payment of the six checks was intended or made; but if such a contract was made, it was invalid.

The fundamental fact underlying all of the technical points involved in this case is that Merchandise's loss was due to the kite and that it by following a most extraordinary and, to say the least, flagrantly negligent course of behavior allowed the kite to continue. It is, therefore, just and equitable that

it should bear the loss which it brought upon itself and that it should not recover any part of this loss from Bank of America.

Dated, San Francisco, California,
December 10, 1951.

Respectfully submitted,
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(Appendix Follows.)

Appendix.

Appendix

THE TRIAL COURT'S FINDING THAT PLAINTIFF RECEIVED THE LOFENDO REMITTANCE CHECKS FOR COLLECTION AND THAT IT GAVE UNITED CONDITIONAL CREDITS FOR THESE CHECKS (I, 99), IS NOT SUPPORTED BY THE EVIDENCE.

This finding is based upon the form of assignment of accounts receivable (pltf's. ex. 6) executed by United to Merchandise each month which read in part as follows:

"The undersigned United Produce Company agrees whenever it receives checks from its customers to endorse them over to the Bank for collection and the Bank will take and handle them for collection."

It is also based upon a provision printed on the back of the deposit slip used by Merchandise (pltf's. ex. 7) reading as follows:

"In receiving and handling items for deposit or collection * * * all items are credited or cashed subject to final payment in cash or solvent credits.
* * *

The bank may charge back any item at any time before final payment, whether returned or not. * * *

The deposit tags did not accompany the Lofendo checks received as remittances (I, 236).

A deposit slip, of course, is used by a bank to accompany deposits made to the credit of a customer; that is why it is called a deposit slip. And the con-

tract stated on the back of Merchandise's deposit slip states Merchandise's right to charge back when items are deposited with it either for immediate credit or for collection.

But the Lofendo checks were not deposited by United in its commercial account and were not accepted by Merchandise in the commercial account of United either for collection or credit. On the contrary, these checks were delivered to Merchandise as remittances on account of accounts receivable; and when received they were in effect applied on account of United's indebtedness to Merchandise. The checks, therefore, did not create credits at all, but were in effect payments. When the checks were dishonored, the result was to restore the indebtedness on account of which the checks had been applied; but the checks were not dishonored until after November 15th, and so Merchandise's right to charge such indebtedness against United's commercial account did not arise until after that date and was not in fact exercised until after that date, and so the balance to United's credit on November 15th against which the six checks were charged was a good balance not diminished by any such offset.

LeRoy's testimony with respect to these transactions was a correct description of them. He testified that checks received as remittances would be applied on account of the indebtedness of United to Merchandise (II, 504); and that when any such check was rejected by the bank on which it was drawn the situation was

the same as though no payment in the amount of such check had been made on account of United's indebtedness (II, 506-507); and that the effect of such rejection was to leave unpaid that part of United's indebtedness to Merchandise on account of which the check had been applied unless there were funds in the commercial account against which it could be charged (II, 507-508).

No. 13,039

IN THE

United States
Court of Appeals

For the Ninth Circuit

BANK OF AMERICA NATIONAL TRUST AND
SAVINGS ASSOCIATION, a National Bank-
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as Trustee in Bankruptcy of the Estate
of UNITED PRODUCE COMPANY, a Cor-
poration, Bankrupt, *Appellants,*

vs.

MERCHANDISE NATIONAL BANK OF CHI-
CAGO, a National Banking Association,
Appellee.

**Brief of Appellant Eugene J. O'Riley, as Trustee in
Bankruptcy of the Estate of United Produce
Company, a Corporation, Bankrupt**

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SUBJECT INDEX

	Page
Preliminary Statement.....	1
Statement of the Case and Appellant's Position on Appeal.....	2
Conclusion	5

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**Brief of Appellant Eugene J. O'Riley, as Trustee in
Bankruptcy of the Estate of United Produce
Company, a Corporation, Bankrupt**

PRELIMINARY STATEMENT

As will appear hereafter, this appellant was originally brought into this case as an interpleaded defendant, and his position in this appeal depends entirely on that of the other appellant Bank of America National Trust and Savings Association (hereinafter referred to as "Bank of America"). Reference is therefore made to the opening

brief of such appellant for a statement as to jurisdiction and the facts of the case. This appellant joins with the Bank of America in its argument as presented in its opening brief, and urges this Court that the judgment of the court below be reversed for the reasons therein stated. This brief will be confined to a statement of this appellant's position in the case and on this appeal.

STATEMENT OF THE CASE AND APPELLANT'S POSITION ON APPEAL

This action was originally brought in the District Court of the United States for the Northern District of California by the appellee, Merchandise National Bank of Chicago (hereinafter referred to as "Merchandise"), against the appellant Bank of America to recover on a deposit account allegedly held by the former with the latter. Upon filing its answer to the complaint, the defendant Bank of America included therewith its interpleader counterclaim, subsequently amended (R. 48, *et seq.*), in which it alleged in effect that, assuming the merit of defenses set forth in its answer, it had in its possession the sum of \$30,920.36 in a deposit account in the name of Frank C. Lofendo (hereinafter referred to as the "Lofendo account"), to which it made no claim. It then alleged that conflicting claims were being or might be made to the Lofendo account by four parties, to wit: plaintiff Merchandise, Frank C. Lofendo, Cy Mouradick and this appellant, Eugene J. O'Riley (hereinafter referred to as the "Trustee"), as Trustee in Bankruptcy of United Produce Company, a corporation, and prayed for an order of the court requiring such alleged claimants to interplead among themselves concerning their

alleged claims (R. 52, 53). Pursuant to such prayer and upon ex parte motion by the Bank of America, the District Court entered its order interpleading said four parties and summoning them to answer the complaint and interpleader counterclaim (R. 6).

In response to such order and summons, the following positions were taken by the four interpleaded parties prior to and during the course of the trial, and were held at the conclusion thereof:

(a) Merchandise filed its reply to the interpleader counterclaim, averring that if it received judgment as prayed in its complaint, there would be no balance in the Lofendo account to be interpleaded, but declaring that in the event it should not be so entitled to judgment, it "does claim" the said \$30,920.36 (R. 18, 19).

(b) Frank C. Lofendo filed his disclaimer, disclaiming any interest in the Lofendo account (R. 7).

(c) Cy Mouradick first filed his answer to the complaint and to the interpleader counterclaim, claiming a lien against the Lofendo account (R. 22-26), but subsequently on motion of Merchandise and the Trustee during the course of the trial, his pleading was ordered stricken (R. 680-682), and his claim therefore dismissed.

(d) The Trustee filed his answer to the complaint and reply to the interpleader counterclaim alleging that the Lofendo account was in fact an account of the bankrupt, United Produce Company, and praying judgment for the entire balance thereof (R. 20, 21).

The office of an interpleader action is to adjudicate the rights of possible claimants to a common fund and thereby protect the stakeholder from multiple liability. Ordinarily,

the existence of the fund is established by its payment into court. In this case, however, it was implicit in the pleadings that the trial court had first to decide the main issue* between the plaintiff and defendant banks in order to establish the existence or non-existence of a fund for distribution to one or more of the interpleaded parties. If Merchandise were to recover judgment as prayed, Bank of America would admittedly have a right of set-off against any apparent balance in the Lofendo account, and the account would be in fact overdrawn. Thus in rendering its judgment for Merchandise, the court below *ipso facto* negated the existence of a fund to be interpleaded, and the issue between Merchandise and the Trustee, as remaining interpleaded claimants thereto, was rendered moot and never tried. On that basis, the Trustee's claim to the \$30,920.36 in response to the interpleader counterclaim was dismissed (R. 115, Conclusion of Law XI).

The Bank of America is taking its own appeal from such judgment (R. 167). The Trustee is appealing from that part thereof dismissing its claim to the Lofendo account made in response to the interpleader counterclaim, on the ground that if this court should reverse the judgment of the court below on the main issue between the two banks, there would then come into existence the fund for which interpleader was sought, and the trial court should then be required to hear the respective claims of Merchandise and the Trustee thereto.

*The term "main issue" is used herein to connote the issues raised by plaintiff's complaint and defendant Bank of America's answer thereto, as distinguished from issues raised by defendant's three counterclaims or its interpleader counterclaim and the various replies thereto.

CONCLUSION

If the judgment of the court below in favor of plaintiff Merchandise shall be reversed by this Court, that part of such judgment (R. 116-118, 117) dismissing the interpleader counterclaim and response thereto of the Trustee, including his answer to the complaint, should likewise be reversed.

Respectfully submitted,

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Dated: December 10, 1951.

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**Brief for Appellee Merchandise National Bank of
Chicago in Answer to Brief of Appellant Bank
of America N. T. & S. A. and Brief of Appellant
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SUBJECT INDEX

	Page
Statement of the Case.....	1
A. Nature of the proceedings: The appeal is an attack on findings and an effort to retry facts.....	1
B. Nature of the action	3
C. The facts.....	4
1. Two unassailed findings on cardinal facts undercut appellant's case.....	4
(a) The "Lofendo" account at defendant's branch was an account of United Produce Co.: "Lofendo" was United Produce	4
(b) United Produce was perpetrating a fraud.....	5
2. The six checks for \$113,216.50.....	6
The Messenger-Estribou conversation, November 17th.....	7
Events of November 18th.....	8
Defendant ignores the instructions and violates its commitment	9
Trial Court's conclusions as to the \$113,216.50.....	10
Reason for defendant's untoward conduct.....	10
There is no element of estoppel.....	12
3. The contractual arrangement between the parties for the collection of the checks.....	12
Finding	12
The evidence supports the finding overwhelmingly.....	13
The document used was a "collection letter," which differs from a "cash letter".....	13
The practice of defendant with respect to plaintiff.....	15
Other evidence.....	16
4. The four checks for \$89,813.10.....	16
Reason for defendant's conduct.....	17

	Page
There is no element of estoppel on this item either.....	19
Trial court's conclusion as to the \$89,813.10.....	20
The evidence supports these findings.....	20
Surreptitiousness of defendant's conduct.....	23
Negligence of defendant's conduct.....	25
Analysis of the Case: The Issues Stated; Summary of Argument.....	26
This is a suit on plaintiff's account with defendant, not on any checks	26
No one ever suffered a loss by reason of the 6 checks for \$113,- 216.50 or the 4 checks for \$89,813.10.....	27
The advice of credit passes out of the case.....	28
There is no element of estoppel against plaintiff.....	30
The question is whether defendant could have sued plaintiff for the \$113,216.50 and the \$89,813.10.....	30
Summary of the discussion to follow on this question.....	31
Summary of the discussion re "payment".....	34
Defendant's charges of negligence and misrepresentation on plain- tiff's part constitute no defenses but mere assertions of counter- claims	35
Discussion	36
I. Defendant Has No Standing to Assert That the Checks Were Collected. It Is Not a Real Party in Interest to Assert the Claim	36
Defendant's relation to the checks: it was never the owner but only United Produce's agent.....	36
Defendant's relationship to plaintiff as respects the checks: Both were the payee's agents.....	37
Defendant has no standing to assert that the checks were col- lected	38
II. In Order to Prevail Defendant Must Not Only Have a Stand- ing but It Must Have a Better Right in the Checks Than United Produce Since the Latter Has No Rights at All.....	41

	Page
A. Where payee and maker are the same, it can acquire no rights against the drawee bank as a result of a check drawn against insufficient funds or as part of a fraud....	41
Answer to defendant's statutory argument.....	43
B. "Lofendo," i.e., United Produce, has never had any rights against plaintiff arising out of the checks.....	46
III. Defendant Has No Better Right Than United Produce, Which Has None.....	51
A. Defendant has no better right than United Produce on a theory that it had a lien on the checks.....	52
B. Defendant has no better right than United Produce on any theory that the agency relationships became automatically transmuted into debtor-creditor relationships by reason of the internal bookkeeping in Chicago.....	55
1. The defendant's argument fails for lack of consideration for any obligation of plaintiff to defendant.....	56
Interpleader	57
Defendant's contract with "Lofendo" precluded any obligation to him.....	57
Trial court's conclusion.....	59
2. Defendant's argument is also destroyed by the agreement of November 17th and 18th, 1948, as found by the trial court.....	59
The agreement of November 17th and 18th did not lack consideration.....	60
The agreement of November 17th and 18th was not voidable for mistake.....	61
The agreement of November 17th and 18th was not vitiated by misrepresentation.....	63
Further on significance of agreement of November 17th and 18th.....	63
3. Even if defendant assumed an obligation to Lofendo, it did not become a holder in due course.....	64

	Page
IV. Plaintiff Had the Right to Revoke the Chicago Book Entries. If They Constituted "Payment," Plaintiff Would Be Entitled to Recover Any Such Payment, Under <i>Weiner v. Roof</i> . Here Also Discussion of the Situation as to the Four Checks for \$89,813.10	65
A. Discussion of the right to recover generally.....	65
Defendant's argument is mostly a quarrel with the findings	68
Illinois law and the law generally.....	69
Defendant's attempted limitations on the right to recover for mistake or fraud are unsound.....	69
Lack of good faith.....	72
Defendant's legal argument about <i>Weiner v. Roof</i> is an attempt to reduce it to nonsense.....	73
B. Discussion of the right to recover with particular reference to the 4 checks for \$89,813.10.....	75
V. The 6 Checks Were Never "Paid" or "Collected".....	78
A. Defendant's argument is vitiated by the major fallacy of ignoring the facts of this case as to the nature of the collection contract.....	80
1. The findings.....	82
2. The evidence supports the finding.....	82
Defendant's contemporaneous conduct.....	83
Defendant's contract with its customer.....	84
Evidence relied on by defendant.....	85
Plaintiff's internal entries in Chicago were the same as a depositor's notations on his check stubs.....	85
Most of defendant's citations are not in point because they involve a different contractual arrangement than was here proved and found.....	86
Cash letter cases.....	87
Cases where the forwarding bank has a deposit account with the collecting bank.....	89
Cases covered by clearing house rules.....	92

	Page
B. A second major fallacy in defendant's argument is that it confounds different senses in which the term "payment" is used.....	92
Across-the-counter cases.....	94
C. A third fallacy lies in citing cases involving the rights of holders in due course or not involving fraud or mistake	95
D. Defendant's citations are irrelevant for still other reasons	98
VI. Discussion of Defendant's Affirmative Claims That Plaintiff Was Negligent, That It Made Misrepresentations, and That It Has Received a Benefit from Defendant.....	99
A. The question whether plaintiff was negligent is a false element in the case.....	99
1. The claim of negligence is a false element because no negligence, if any, of plaintiff had any causal relationship to defendant's loss.....	100
The findings.....	100
The evidence compelled the finding.....	101
2. The claim of negligence is a false element because defendant is precluded from recovering on its counterclaim by reason of its own negligence.....	103
3. The claim of negligence is a false element because plaintiff owed no duty to defendant in the premises..	104
4. Answer to the argument that no finding was made on the allegation that plaintiff was negligent.....	107
B. Answer to the contention that defendant's loss was caused by representations of plaintiff.....	109
Finding	109
The evidence compelled the finding.....	110
C. Answer to the contention that plaintiff received a benefit and therefore may not recover.....	112
VII. Answer to Brief of Appellant Eugene J. O'Riley.....	116

	Page
Conclusion	117
Appendix	
1. United Produce had but one account with plaintiff.....	App. 1
2. The contractual arrangement between plaintiff and United Produce	App. 1

INDEX OF AUTHORITIES

CASES	Pages
Adolph Ramish, Inc. v. Woodruff, 2 Cal.2d 190, 40 Pac.2d 509....	114
Aebli v. Board of Education, 62 C.A.2d 706, 145 Pac.2d 601.....	66
American Exchange National Bank v. Gregg, 28 N.E. 839, 138 Ill. 596	80, 94n, 95, 98n
American National Bank v. Miller, 229 U.S. 517.....	98n
Bath National Bank v. Sonnenstrahl, 164 N.E. 327, 249 N.Y. 391..	36n
Beane v. First National Bank and Trust Company, 92 F.2d 382 (4 Cir.)	88
Berry v. Bakersfield, 177 Cal. 206, 170 Pac. 415.....	52n
Bessler Movable Stairway Co. v. Bank of Leakesville, 140 Miss. 536, 106 So. 445.....	75n
Bohlig v. First National Bank, 48 N.W.2d 445 (Minn.).....	29, 79, 94
Bosworth, Receiver v. Continental Illinois Bank & Trust Co., 291 U.S. 643	40
Bowen v. Johnston, 306 U.S. 19.....	69n
Bradley Lumber Co. v. Bradley County Bank, 206 Fed. 41.....	74n
Buckley v. Gray, 110 Cal. 339.....	105
Carlson v. Murphy, 8 C.A.2d 607, 47 P.2d 1100.....	109
Carnegie Trust Co. v. First National Bank, 141 N.Y.S. 745.....	45n
Carstens v. McLean, 7 F.2d 322 (9 Cir.).....	70
Cavanagh v. Tyson, Weare & Marshall Co., 116 N.E. 818 (Mass.)	62n
Chester Valley, The, 110 F.2d 592 (5 Cir.).....	104
Citizens State Bank v. Western Union, 172 F.2d 950.....	106
Cleveland Cliffs Iron Co. v. East Itasca Mining Co., 146 Fed. 232..	62
Cohen v. Tradesmen's National Bank, 105 Atl. 43, 262 Pa. 76....	105, 106
Crab Orchard Improvement Co. v. Chesapeake & O. Ry. Co., 33 F. Supp. 580.....	106n
Cullen v. Donahue, 121 Atl. 392, 45 R.I. 237.....	45n
Dakin v. Bayly, 290 U.S. 143.....	40, 58, 59, 82, 91
Dean Tobacco Warehouse v. American National Bank, 123 Tenn. 365, 117 S.W.2d 746.....	58n, 81n, 87n, 89
Dunlap v. Commercial National Bank, 50 Cal. App. 476, 195 Pac. 688	44

	Pages
Edelen v. Oakland Bank of Savings, 39 Cal. App. 302, 178 Pac. 737	100
Elgin National Bank v. Goecke, 295 Ill. 403, 129 N.E. 149.....	114n
Erie Railroad Co. v. Tompkins, 304 U.S. 64.....	2, 37n, 98
Estate of Bristol, 23 Cal.2d 221, 143 P.2d 689.....	2n
First Federal Trust & Savings Bank v. Kent, 119 F.2d 151 (6 Cir.)	37n, 99
First National Bank v. Noble, 179 Ore. 26, 168 Pac.2d 354.....	41n, 98
First National Bank of Corsicana v. Wm. Cameron & Co., 149 S.W.2d 132 (Tex. Civ. App.).....	89, 90
First National Bank of Richmond v. Davis, 114 N.C. 343, 19 S.E. 280	89, 98n, 99n
First State Bank and Trust Company v. First National Bank, 145 N.E. 382, 314 Ill. 269.....	64
Friedman v. Irving Trust Company, 300 N.Y.S. 51.....	79, 90
Gillett v. Williamsville State Bank, 34 N.E.2d 552, 310 Ill. App. 395	45, 69, 89, 96
Goggin v. Bank of America, 183 F.2d 322 (9 Cir.).....	52n, 54, 92, 114n
Gonsalves v. Bank of America, 16 Cal.2d 169, 105 Pac.2d 118....	52
Greeley National Bank v. Wolf, 4 F.2d 67 (8 Cir.).....	108
Grower's Marketing Service v. Webster & Atlas National Bank, 62 N.E.2d 225, 318 Mass. 496.....	36
Guardian National Bank v. Huntington County State Bank, 187 N.E. 388, 206 Ind. 185, 92 A.L.R. 1056.....	28, 56, 78, 86, 94, 95
Hallenbeck v. Leimert, 295 U.S. 116.....	89, 97
Hansen v. Bear Film Co., 28 Cal.2d 154, 168 Pac.2d 946.....	26n
Hay v. First National Bank of Springfield, 244 Ill. App. 286.....	94n
Hayes v. Tootle-Lacy National Bank, 72 F.2d 429.....	97
Hekler v. Ward, 21 F. Supp. 710.....	89, 98n, 99n
Helvering v. Gowran, 302 U.S. 238.....	116
Hilliard v. Bank of America, 102 C.A.2d 730, 228 Pac.2d 327....	72n
Holland v. Russell, 121 Eng. Rep. 773, 1 B. & S. 424, aff'd 4 B. & S. 1	75n
Hullett v. Cadick Milling Co., 90 Ind. App. 271, 168 N.E. 610....	75n
Independent etc. Assn. v. Fort Dearborn Bank, 142 N.E. 458, 311 Ill. 278.....	44

	Pages
In re Cummins Constr. Corp., 72 F. Supp. 409, aff'd 164 F.2d 983, cer. den. 333 U.S. 881.....	52n
Irving Bank v. Wetherald, 36 N.Y. 335.....	45
Johnston v. Landucci, 21 Cal.2d 63, 130 Pac.2d 405.....	83
Kales v. Houghton, 190 Cal. 294, 212 Pac. 21.....	83
Kane v. First National Bank, 56 F.2d 534 (5 Cir.).....	54
Krueger v. First National Bank, 217 Ill. App. 18.....	38n, 39
Lafarge v. Kneeland, 7 Cow. 454.....	74n
Langley v. Warner, 3 N.Y. 327.....	75n
Lefrooth v. Prentice, 202 Cal. 215, 259 Pac. 947.....	69n
Lincoln County v. Gibson, 255 Pac. 119.....	27n, 79n
Lloyd v. Kleefisch, 48 C.A.2d 408, 120 Pac.2d 97.....	26n
Lucke v. First National Bank, 193 Cal. 184, 223 Pac. 547.....	58, 80
Maget v. Bartlett Bros. Land & Loan Co., 226 Mo. App. 416, 41 S.W.2d 849	89, 90, 92n
McGregor v. Millar, 166 Kans. 657, 203 Pac.2d 137.....	62
Merchants National Bank v. Continental National Bank, 98 Cal. App. 523, 277 Pac. 354.....	92
Mitau v. Roddan, 149 Cal. 1, 84 Pac. 145.....	83
Mowatt v. McLean, 1 Wend. 173 (N.Y.).....	75n
Mt. Morris Bank v. Twenty-Third Ward Bank, 64 N.E. 810 (N.Y.)	45n
National Bank v. Burkhardt, 100 U.S. 686.....	98n
National Bank v. Uptown State Bank, 273 Ill. App. 401.....	64
National Bank of California v. Miner, 167 Cal. 532, 140 Pac. 27	56, 66, 67, 70
National Bank of Commerce of Kansas City v. American Exchange Bank of St. Louis, 52 S.W. 265, 151 Mo. 320.....	68
National Bank of New Zealand v. Finn, 81 Cal. App. 317, 253 Pac. 757.....	36n
Nineteenth Ward Bank v. First National Bank, 184 Mass. 49, 67 N.E. 670.....	92n, 93n
Oakland Bank of Savings v. Murfey, 68 Cal. 455, 9 Pac. 843.....	100
O. B. Avery v. Highway Commissioner, 2 N.E.2d 77, 363 Ill. 279	87, 89, 93n

	Pages
Oedekerck v. Muncie Gear Works, Inc., 179 F.2d 821 (7 Cir.)....	107
Omaha National Bank v. Brady State Bank, 204 N.W. 796.....	79n
O'Neil v. First National Bank of Lovelock, 15 F. Supp. 133-57, 58, 92, 93	
Oregon Iron & Steel Co. v. Kelso State Bank, 129 Wash. 109, 224	
Pac. 569.....	43, 89, 97
Pacific Acceptance Corp. v. Goodman, 72 C.A. 143, 236 Pac. 964..	36n
Pacific National Agricultural Credit Corp. v. Wilbur, 2 Cal.2d 576,	
42 Pac.2d 314.....	79
Park & Tilford Import Corporation v. Passaic National Bank &	
Trust Co., 30 A.2d 24 (N.J.).....	112
People v. LaRue, 28 C.A.2d 748.....	29n
People ex rel. Nelson v. Peoples Bank & Trust Company, 187 N.E.	
522, 353 Ill. 479.....	81
People ex rel. Nelson v. Sheridan Trust and Savings Bank, 358	
Ill. 290, 193 N.E. 186.....	88, 89, 96, 98n
People's F. & T. Co. v. Matthews, 104 Cal. App. 630, 286 Pac.	
710	64
Person v. United States, 112 F.2d 1, cer. den. 311 U.S. 672.....	26n
Podlasky v. Price, 87 C.A.2d 151, 196 Pac.2d 608.....	108, 109, 111
Pratt v. Dittner, 51 Cal. App. 512, 197 Pac. 365.....	69n
Rickey v. New York State Nat'l Bank, 7 F. Supp. 29.....	89, 98n
Rock Finance Co. v. Central National Bank of Sterling, 89 N.E.2d	
828, 339 Ill. App. 319 (1950).....	45
Rock Island Plow Company v. Perry, 20 S.W.2d 956 (Mo. App.)..	79n
Rodgers v. Farmers Bank of Nolanville, 264 S.W. 491 (Tex.)....	79n
Routh v. Quinn, 20 Cal.2d 488, 127 Pac.2d 1.....	104, 105n
Savings Bank v. Ward, 100 U.S. 195.....	105
Schilling v. Schwitzer Cummins, 142 F.2d 82.....	107
Security etc. Bank v. Southern etc. Bank, 74 Cal. App. 734, 241	
Pac. 945	80, 92
Security National Bank of Sioux City v. Old National Bank, 241	
Fed. 1.....	96, 97, 99
Shelaeff v. Groves, 27 F. Supp. 1018.....	106
Sistrom v. Anderson, 51 C.A.2d 213, 124 Pac.2d 372.....	60, 61
South Boston Co. v. Levin, 143 N.E. 816 (Mass.).....	53n
Spokane & Eastern Trust Co. v. Huff, 63 Wash. 225, 115 Pac. 80..	98
State v. Day, 76 C.A.2d 536, 173 Pac. 399.....	108

Pages

State Bank of Chicago v. Mid-City Bank, 217 Ill. App. 81.....	44
Steinhart v. National Bank, 94 Cal. 362, 29 Pac. 717..28, 45, 47, 66, 78, 99	
Storing v. First National Bank of Minneapolis, 28 F.2d 587....89, 98n, 99n	
Tanner v. Title Ins. & Trust Co., 20 Cal.2d 814, 129 Pac.2d 383..	83
Taylor v. Metropolitan Ry. Co., [1906] 2 K.B. 55.....	75n
Triangle Conduit & Cable Co. v. F. T. C., 168 F.2d 175, aff'd 336	
U.S. 956.....	60, 108
Turetsky v. Morris Plan Industrial Bank, 22 N.Y.S.2d 514.....	71, 92n
Union Old Lowell National Bank v. Paine, 61 N.E.2d 666, 318	
Mass. 313.....	105
United States v. Fotopulos, 180 F.2d 631 (9 Cir.).....	2
Universal Sales Corp. v. Cal. etc. Mfg. Co., 20 Cal.2d 751, 128	
Pac.2d 665	83
Utah Copper Co. v. Railroad Retirement Board, 129 F.2d 358....	116
Walling v. General Industries Co., 330 U.S. 545.....	2, 3
Weiner v. Roof, 19 Cal.2d 748, 122 Pac.2d 896.....	
.....33, 66, 67, 68, 72, 73, 74, 76, 77, 114	
Western Auto Supply v. Phelan, 104 F.2d 85 (9 Cir.).....	106n
White v. Rutherford, 148 S.W. 598 (Tex. Civ. App.).....	75n
Widney v. United States, 178 F.2d 880 (10 Cir.).....	3
Winslow v. Anderson, 78 N.H. 478, 102 Atl. 310.....	74n

STATUTES AND RULES

California Bank Act, Section 16(c).....	58
California Civil Code:	
Section 1559.....	61
Section 1577.....	62n
Section 1689, subd. 3 and 4.....	56
Section 1709.....	109
Section 3054.....	52
Section 3106.....	114n
Section 3108.....	52, 54, 114n
Section 3133.....	53n, 114n

	Pages
California Civil Code (Continued) :	
Section 3135.....	64
Section 3136.....	65
Section 3200.....	53n
Section 3265 to 3265 (g).....	44
Section 3265 (a).....	53n
Section 3265 (e).....	44n, 53n
Section 3266.....	53n
Section 3535.....	83
California Code of Civil Procedure, Section 1875 (3).....	69n
California Penal Code, Section 476(a).....	29n
Cal. Stat., 1943, Ch. 930, p. 2803.....	58
Illinois Laws, 1949, p. 1160, Sec. 1.....	43n
Illinois Negotiable Instruments Act, Section 207 (a).....	43, 44, 45
Rules of Civil Procedure, Rule 9(b).....	108
Smith-Hurd's Illinois Statutes:	
Ch. 98, Section 45.....	114n
Ch. 98, Section 47.....	114n
Ch. 98, Section 72.....	53n, 114n
Ch. 98, Section 74.....	64
Ch. 98, Section 140.....	53n
Ch. 98, Section 205 to 211.....	44
Ch. 98, Section 206.....	53n
Ch. 98, Section 207 (a).....	44, 45
Ch. 98, Section 210.....	44n
Ch. 98, Section 213.....	53n
Uniform Negotiable Instruments Law:	
Section 25.....	114n
Section 27.....	114n
Section 52.....	53n
Section 54.....	64
Section 55.....	65
Section 119.....	53n
Title III, Sections 184 to 189.....	44
Title III, Section 185.....	53n
Title III, Section 189.....	44
Title III, Section 191.....	53n

TEXTS AND MISCELLANEOUS

Pages

Advisory Committee's notes to R.C.P. Rule 52.....	3
American Jurisprudence, Vol. 40, Sec. 194, pp. 848, 849.....	70
Annotation, A.L.R.:	
Vol. 80, p. 1064.....	36n
Vol. 118, pp. 363-382.....	91
Brady on Bank Checks (2d ed.) p. 423.....	42
California Jurisprudence, Vol. 19, pp. 641, 642.....	100
California Law Review, Vol. 21, p. 312.....	74
Corbin on Contracts (1951), Vol. 3, Sec. 598, pp. 356, 358.....	62
Corpus Juris, Vol. 48, p. 763.....	62
Corpus Juris Secundum:	
Vol. 6, Sec. 99, p. 1155.....	45
Vol. 9, p. 502.....	29n, 86, 94
Vol. 9, p. 503.....	42
Vol. 9, pp. 614, 615.....	52n
Vol. 9, pp. 724, 725.....	41
Vol. 9, p. 783.....	44
Vol. 9, p. 785, Sec. 367.....	45
Vol. 9, p. 793, Sec. 376(b).....	45
Vol. 10, p. 984, Sec. 448(c).....	53n
Vol. 17, p. 497.....	62n
Vol. 70, p. 369.....	62
Mechem on Agency (2d ed.):	
Vol. 1, p. 1060.....	66, 68
Vol. 1, p. 1064.....	68n
Michie on Banks and Banking, Vol. 6, p. 4.....	36n
Moore's Federal Practice (2d ed.):	
Vol. 2, pp. 1687-1691.....	26n
Vol. 5, pp. 2659-2661.....	107
Munn's Encyclopedia of Banking and Finance.....	15n
Restatement of the Law of Agency, Sec. 339, Comment f, p. 747....	77
Restatement of the Law of Contracts, Section 167.....	45
Restatement of the Law of Restitution:	
Section 9.....	62n
Section 11 (3).....	62n

	Pages
Restatement of Law of Restitution (Continued):	
Section 14.....	72
Section 14, Illus. 8.....	43
Section 143, p. 579.....	74
Section 143, Comment c, p. 581.....	77
Section 172, p. 693.....	45n
Ruling Case Law:	
Vol. 3, p. 633.....	36n
Vol. 5, pp. 525, 526.....	45
Williston on Contracts (Rev. ed.), Vol. 5, Sec. 1569, p. 4380.....	62n
Zollman on Banks and Banking:	
Vol. 7, p. 444.....	43
Vol. 7, p. 447.....	43n
Vol. 8, p. 114.....	37
Vol. 8, p. 115.....	37n, 38
Vol. 8, p. 116.....	36
Vol. 8, p. 118.....	38n
Vol. 8, p. 123.....	38
Vol. 8, p. 126.....	38
Vol. 8, p. 222.....	79n
Vol. 8, p. 255.....	104
Vol. 8, p. 322.....	78, 79n
Vol. 8, p. 328.....	92n
Vol. 8, pp. 351, 354-356.....	36n
Vol. 8, p. 358.....	81
Vol. 8, p. 389.....	81
Vol. 8, p. 401 (fn. 1).....	90
Vol. 8, p. 451.....	69

IN THE

United States
Court of Appeals

For the Ninth Circuit

BANK OF AMERICA NATIONAL TRUST AND
SAVINGS ASSOCIATION, a National Banking
Association, and EUGENE J. O'RILEY, as
Trustee in Bankruptcy of the Estate of
UNITED PRODUCE COMPANY, a Corpora-
tion, Bankrupt,

Appellants,

vs.

MERCHANDISE NATIONAL BANK OF CHICAGO,
a National Banking Association,

Appellee.

**Brief for Appellee Merchandise National Bank of
Chicago in Answer to Brief of Appellant Bank
of America N. T. & S. A. and Brief of Appellant
Eugene J. O'Riley, Etc.**

STATEMENT OF THE CASE

**A. Nature of the Proceedings:—The Appeal Is an Attack on
Findings and an Effort to Retry Facts.**

This is an appeal by the defendant, Bank of America N. T. & S. A., from a money judgment in favor of the plaintiff, Merchandise National Bank of Chicago. There is another appellant,

The notation "R." refers to the record. "Br." refers to the brief of appellant Bank of America N. T. & S. A.

All emphasis in quotations has been added.

O'Riley, but he admits that he has no case unless the defendant should prevail. We answer his appeal at page 116, *infra*. The appellant Bank of America will hereafter be referred to, generally, as defendant and appellee as plaintiff.

Federal jurisdiction is founded solely on diversity of citizenship,¹ and no federal questions are involved. As defendant concedes (Br. p. 17), the case is therefore governed by state law under *Erie R. R. Co. v. Tompkins*, 304 U.S. 64.

The applicable law is that of California; Illinois law applies to the extent that the California rules of conflict of laws permit, since some of the events occurred in Illinois.

This is a fact case. It was tried, without a jury, for 10 trial days. There were 16 witnesses and many exhibits. The District Court made an unusually complete set of findings (R. 95-116).

At every turn defendant's brief collides with express findings or proper inferences from them. It reads like an argument addressed to a trial court and is an attempt to have this Court find the facts differently than the trier did.² Although defendant states that "the important facts * * * are undisputed," it asserts that its appeal is based, not only on alleged errors of law, but also on "erroneous * * * inferences drawn by the trial court from the undisputed facts" (Br. p. 6).

But drawing inferences of fact is the province of the trial court. Such inferences are themselves fact, and findings thereon are like any other findings, controlling unless clearly erroneous. *United States v. Fotopulos*, 180 F.2d 631, 635 (9 Cir.);³ *Walling v. Gen-*

¹The plaintiff is a citizen of Illinois and the defendant of California (Findings I, II and III, R. 95, 96).

²Cf. Specifications of Error, Appellant's Br. pp. 11-14.

³This Court said in the *Fotopulos* case:

"And the trial court having made them, any attempt on the part of the appellate court to 'draw an inference of fact constitutes a 'usurpation of the province of the trial court' ' ' ' .

As said in *Estate of Bristol*, 23 Cal.2d 221, 143 P.2d 689, "when two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court."

eral Industries Co., 330 U.S. 545, 550; *Widney v. United States*, 178 F.2d 880, 884 (10 Cir.); Advisory Committee's notes to R.C.P. Rule 52. And here, as we shall show, the inferences drawn are the only tenable ones.

Although the essence of the appeal is an attack on findings, many of them are unassailed, including crucial ones. In relating the facts we shall rest on the findings, unless a finding is attacked or more detail will be helpful.

It was to defendant's interest to make the facts seem complicated and confused. Actually they are so simple that elementary legal principles decide the case.

B. Nature of the Action.

Defendant's brief begins with a misstatement. It describes the judgment as one by which plaintiff recovers "payments" made by it to defendant. In fact, this is an action by a depositor in a bank against the bank to recover the balance in a deposit account (R. 61).

In 1948 plaintiff had a deposit account with defendant (Finding IV, R. 96). Consequently, defendant was plaintiff's debtor. On November 23, 1948, plaintiff, the creditor, made demand on defendant, the debtor, for payment of the entire credit balance. As found, the account then had a credit balance of \$386,577.61 (Finding XXX, R. 113). After long delay defendant paid part of the balance, insisting that it had paid in full. But it left unpaid \$203,047.60. The judgment was for this amount, plus interest (Finding XXX, R. 113; Conclusion X, R. 115; Judgment, R. 117).

The controversy revolves around two debits entered by defendant against the account of its depositor, the plaintiff, in November 1948: (1) A debit of \$113,216.50, and (2) a debit of \$89,813.10.

The issue in the case was whether defendant had the right to make or stand on those debits. The trial court found that it did not.

C. The Facts.

1. TWO UNASSAILED FINDINGS ON CARDINAL FACTS UNDERCUT APPELLANT'S CASE.

There are two cardinal facts which distinguish this case and render all defendant's citations irrelevant. Both are found, and neither finding is assailed.

(a) The "Lofendo" Account at Defendant's Branch Was an Account of United Produce Co: "Lofendo" Was United Produce.

A company known as United Produce Company had an account in Chicago with plaintiff bank (Finding V, R. 97). At defendant's East Bakersfield branch in California an account was maintained in the name of "Frank C. Lofendo." But that account was just another account of United Produce, just "another pocket." Although there was a natural person named Lofendo, he had no interest in the account or in any check going through it regardless of the presence of his name. The District Court so found and stated that the account would thereafter be referred to "as the 'Lofendo account,' but only for convenience" (Finding VI, R. 97).

The court further found (Finding VII, R. 97):

"That from time to time United Produce Company drew checks on its account with the plaintiff payable to 'Lofendo,' endorsed them with the name of 'Lofendo' and delivered them to defendant's branch, and they were sometimes received for deposit in its account, the so-called 'Lofendo account,' and sometimes for collection; that while the payee on those checks was designated 'Frank C. Lofendo,' United Produce Company was in fact the payee using the name 'Lofendo' to designate itself * * * that while * * * there was a natural person named Frank C. Lofendo, that person had no interest or claim in said 'Lofendo account' or in any checks drawn by United Produce Company on the plaintiff payable to 'Frank C. Lofendo' or in any of their proceeds."

The nature and purpose of the Lofendo account were a major item of proof on plaintiff's case, they were overwhelmingly established,⁴ and the findings are not assailed.

(b) United Produce Co. Was Perpetrating a Fraud.

The next cardinal fact is that United Produce was perpetrating a criminal swindle, that the purpose of maintaining the "Lofendo" account in defendant's branch was to assist it to do so, and that the account was a mere instrumentality used by it in this fraud. Thus Finding VII states (R. 98):

"that from time to time United Produce Company drew checks on its said 'Lofendo account' at defendant's branch payable to itself under the designation 'United Produce Co.' and delivered them to the plaintiff for deposit to its account with plaintiff or for collection; that upon delivering such checks to plaintiff for collection, United Produce Company falsely represented to plaintiff that the checks were actual remittances from a natural person named 'Lofendo,' that 'Lofendo' was a debtor of United Produce Company, and that the checks were payments received by United Produce Company from Frank C. Lofendo on account of debts owing to it from him arising from the sale of produce; that the purpose of United Produce Company in maintaining the 'Lofendo account' and in drawing checks on its two accounts in the manner just stated was to cheat and defraud plaintiff;"

United Produce's account with plaintiff, in Chicago, was maintained under an agreement whereby checks received by plaintiff from United Produce and represented to be remittances from debtors were received for collection, and conditional credits were entered in the account subject to charge-back at any time before actual collection of the funds (Finding VIII, R. 99).

⁴E.g., testimony of Lofendo, R. 1194-5, Gassman, R. 1196-1257, Howell, R. 588, and exhibits introduced in connection with Gassman's testimony, R. 745-749, P. Ex. 24-30. Most of these exhibits were not printed, since this Court made an order permitting reference without printing.

Between November 4 and 12, 1948, plaintiff received from United Produce over \$500,000 of checks drawn by United Produce on its 'Lofendo' account, and gave conditional credit. These checks were fraudulent and were backed by no funds. Concurrently United Produce was perpetrating other frauds on plaintiff such as obtaining credits on the basis of fictitious collateral (Finding IX, R. 99).

As a consequence of these frauds, on November 12 and 15, 1948 there was an *apparent* credit balance in United Produce's account with plaintiff. But in fact there was no credit balance at all. Instead there was an overdraft exceeding \$500,000 (Finding X, R. 100).

These findings are fully supported (e.g., R. 221-223, 230-243), and they are not really questioned. Defendant does assert that the balance in United Produce's account with plaintiff ought to be called a "real" credit balance because the \$500,000 of bad checks had been received by plaintiff in connection with remittances on old loans, new loans were made to United Produce Co. on the assumption that the old loans were paid and on the security of fictitious collateral, and the amount of the loans was placed to United's credit on the commercial ledger (e.g., Br. 26, et seq.).

But this is a mere quibble of characterization. The essential fact is not contested: the apparent credit arose from fraudulent use of worthless checks and non-existent collateral. And on November 12 and 15, not only did plaintiff owe United nothing, but United was overdrawn well in excess of \$500,000. We discuss this matter further at pages 46-50, *infra*.

2. THE SIX CHECKS FOR \$113,216.50.

In this state of affairs United Produce drew six checks on its account with plaintiff payable to itself under the name of Lofendo, totalling \$113,216.50. It mailed them to defendant's branch

where they arrived on November 13, 1948. Defendant declined to receive them for deposit but accepted them only as agent of the payee for collection.⁵ *It did not give any credit thereon to the Lofendo account* (Finding XI, R. 100).

This is another cardinal fact of the case.

Since United Produce was Lofendo, defendant became United Produce's agent for collection. Defendant then "mailed the 6 checks by a 'collection letter' to the plaintiff for collection" (Finding XI, R. 100). They reached plaintiff on November 15th; "they never were in fact paid or collected; * * * United Produce Company did not * * * have any funds in the account with which to pay the 6 checks or against which they could be collected" (Finding XII, R. 100). But plaintiff's employees, deceived and misled by the fraud referred to above, assumed that there were funds in the account sufficient to meet the checks, perforated the checks "paid," made bookkeeping entries on plaintiff's internal records accordingly, and mailed to defendant an "advice of credit" to the effect that the 6 checks had been collected (Finding XIII, R. 101).

The Messenger-Estribou Conversation, November 17th.

Two days later, November 17th, plaintiff discovered the fraud perpetrated on it by United Produce. Its controller and vice president, Mr. Messenger, immediately telephoned to defendant and spoke to defendant's Branch Manager, Mr. Estribou.

Mr. Messenger stated that plaintiff had just discovered that United Produce had been perpetrating fraud on it and had swindled it out of a very large sum of money. He informed defendant that an advice of credit for the \$113,216.50 had been mailed, said that it had been sent out by mistake and as a result of the fraud, and stated that the 6 checks had not in fact been collected or paid (Finding XIV, R. 101).

⁵Appellant's brief (p. 7) incorrectly states that the branch "received [these checks] for deposit." The contrary was stipulated, R. 1175, 1176.

He asked whether defendant had received the advice of credit and was told no. Thereupon he notified defendant that it was rescinded and revoked. Defendant then *agreed* with plaintiff not to act upon the advice of credit if and when received and further agreed to return it to an emissary of plaintiff, Mr. LeRoy, who would fly out for it (Finding XIV, R. 102).

Two facts may be emphasized:

1. Defendant did not know that the advice of credit had been sent out until this telephone conversation. Its first knowledge of what had occurred in plaintiff's offices in Chicago relative to the 6 checks came with the information that what had happened was in error and was rescinded and revoked (Finding XIV, R. 102).

2. *Defendant had not yet given any credit on the 6 checks to the Lofendo account, had not paid out a penny to anyone in reliance thereon and had not acted in any way on the supposition that the checks had been collected* (Finding XVII, R. 103).

Events of November 18th.

The next day, November 18th, plaintiff's Executive Vice President, Mr. LeRoy, arrived in San Francisco. What then happened is succinctly *found* (Finding XV, R. 102):

"* * * both orally and in writing [plaintiff through LeRoy] advised defendant that the 6 checks had not been collected, that the advice of credit had been sent out by mistake, that it was rescinded and revoked, and that the plaintiff rescinded any authority to the defendant to make any charge to plaintiff's account with defendant in reliance on the advice of credit when and if received * * *"

The finding continues (Finding XV, R. 103):

"that on the same day defendant agreed that it would not act upon the advice of credit when received, that it would return the advice of credit to plaintiff, and that plaintiff should return the 6 checks to defendant; that on the same

day plaintiff again advised defendant orally and in writing that United Produce Company had defrauded plaintiff of a sum in excess of \$500,000 by the means and instrumentality of fraudulent and fictitious checks drawn by United Produce Company on the account maintained at defendant's branch in the name of Frank C. Lofendo, and that Lofendo was a participant in the fraud."

Plaintiff did return the 6 checks after marking them with a notation "Cancelled in error" (Finding XVI, R. 103).

Defendant Ignores the Instructions and Violates Its Commitment.

On November 19, 1948, the advice of credit reached defendant (Finding XVII, R. 103). But defendant coldly refused to return it to Mr. LeRoy. The next day, acting in what it admits was an "unusual" manner (R. 182), it charged plaintiff's deposit account with the sum of \$113,216.50 and credited a like amount to the "Lofendo" account (Finding XIX, R. 104).

Defendant purported to do this on the authority of the advice of credit. And it made entries on its own books purporting to show collection of the 6 checks as of November 19th (Finding XIX, R. 105).

The District Court found (Finding XIX, R. 104):

"that the said charge against the account of the plaintiff was made without any authority from plaintiff to do so, contrary to plaintiff's instructions already received by defendant and already agreed to by it, and without any legal right, and it was wholly insufficient to reduce the defendant's indebtedness to the plaintiff by any amount whatever."⁶

⁶Evidence supporting the findings relative to the Messenger-Estribou telephone conversation of November 17th and relative to what happened when Mr. LeRoy came to San Francisco on November 18th is contained in stipulations (R. 445-7, 1175-76), in letter (P. Exs. 10, 11, R. 1171, 1174A), in testimony of Messenger (R. 220-6), of LeRoy (R. 448-67), of Duncan (R. 518, 519, 523-37, 542-60), of Johnson (R. 691-702), and of Estribou (R. 339-50, 359-402).

Trial Court's Conclusions as to the \$113,216.50.

The trial court concluded as follows:

Conclusion IV: "That the rescinded and cancelled advice of credit is not and cannot be the basis for credit, claim, charge or set-off by defendant against plaintiff" (R. 114).

Conclusion V: "That defendant never acted to its detriment in reliance upon the rescinded and cancelled advice of credit" (R. 114).

Conclusion VII: "That defendant's charge of \$113,216.50 against the account of plaintiff was made without authority or right and did not reduce defendant's indebtedness to plaintiff" (R. 114, 115).

Reason for Defendant's Untoward Conduct.

Defendant's conduct was the result of the crassest motives. The facts are summarized in Findings XX-XXIV, inclusive (R. 105-107):

As early as October 22, 1948 defendant became suspicious that the "Lofendo" account was being maintained as part of a check-kiting operation of United Produce Company. It thereupon instructed its employees not to accept for immediate credit any checks drawn by United Produce to the order of Lofendo but to take them as agent for collection only, giving credit only when collection was actually effected by receipt of good funds, and no checking against any such items was to be permitted until collection was so completed.

On November 10th defendant's suspicion hardened into conviction: "On November 10, 1948 defendant became positive that the transactions going on between 'Lofendo' and United Produce Company were not ethical but were part of some dishonest scheme" (Finding XX, R. 105).

Because of this belief, entertained as early as October 22nd and hardened into conviction on November 10th, *defendant thereupon imperatively reiterated its instructions to its employees.*

For several days defendant heeded its own instructions. Then, on November 16th it received from United Produce through the mail checks aggregating \$97,207 drawn by United to the order of "Lofendo". Contrary to its instructions, defendant's employees negligently received these for deposit and gave the "Lofendo" account immediate credit. Then, on the same day, they negligently honored checks drawn on the "Lofendo" account and paid out over \$109,569. By so doing defendant paid out over \$96,000 more than the true collected balance.

Late on November 18th it received a wire from its Chicago correspondent [not plaintiff] that the checks for \$97,207 had been rejected for lack of funds. Its officers immediately examined its records and discovered what its employees had done in violation of instructions.⁷ Defendant thus learned that it had sustained a loss of over \$96,000.

If it could only get funds, somehow, into the "Lofendo" account against which it could charge back the rejected checks for \$97,207, it might retrieve its loss. It cast about for some way to do so. Fortuitously, plaintiff's advice of credit concerning the \$113,216.50 arrived the very next morning, November 19th. Seizing upon this advice of credit, ignoring plaintiff's prior instructions and its own commitment, defendant charged plaintiff's account with \$113,216.50, credited that sum to the "Lofendo" account, and concurrently charged the "Lofendo" account with the sum of \$97,207. It did these acts "all for its own benefit" (Finding XXIV, R. 108).

Stating it bluntly, defendant had been robbed by United Produce Company, and so it turned around and sought to rob plaintiff.⁸

⁷"Q. You were astonished?

"A. That is putting it mildly." (R. 374)

⁸Evidence supporting these findings may be found in P. Exs. 12 and 13 (R. 1174B, 1174C), testimony of Estribou (R. 359-75, 388, 418-19, 422), testimony of Cosgrove (R. 433-40), of Tarr (R. 560-565), and stipulation (R. 1178-1182).

There Is No Element of Estoppel.

The findings make another cardinal fact clear. Defendant's loss of \$96,000

"was in no way connected with the 6 checks for \$113,216.50 or anything that had occurred with respect to those 6 checks either at the defendant's offices or at the plaintiff's offices or with anything that had been done relative thereto by the plaintiff or the defendant; that the loss was the sole and proximate result of defendant's own carelessness and negligence, as aforesaid" (Finding XXIII, R. 107).

Again (Finding XVIII, R. 104):

"That at no time did defendant give anything of value to anyone for the said 6 checks or any of them or any part thereof."

And again (Finding XVII, R. 104):

"at no time did the defendant in any way take any action whatsoever in reliance on the advice of credit relative to the 6 checks or in reliance on the supposed collection or payment of the said checks, and in no way at any time did it ever change its position or suffer any prejudice in reliance on any supposition that the said 6 checks or any of them had been collected or paid."

3. THE CONTRACTUAL ARRANGEMENT BETWEEN THE PARTIES FOR THE COLLECTION OF THE CHECKS.

Before relating the facts concerning the other debit charge of \$89,813.10, we note another major fact in the case. That is the contractual arrangement between the parties covering the collection of the checks.

Finding.

The trial court found the terms of the contract thus:

"throughout the year 1948 plaintiff had a deposit account with the defendant with a large credit balance in plaintiff's

favor; that during the existence of that account, defendant from time to time sent to plaintiff for collection checks drawn upon the plaintiff; *that in such cases, defendant was authorized by plaintiff to charge plaintiff's said account with the amount of the checks, and would so charge the account only upon actual receipt from the plaintiff of a written authorization to do so, in the form of an outstanding and unrevoked credit memorandum or advice of credit; that this was the uniform custom, practice and arrangement between plaintiff and defendant* and was observed by defendant at all times until November 19, 1948" (Finding IV, R. 96).

This is a finding that, under the contract of the parties, collection and payment by plaintiff of checks sent to it by defendant for collection was not deemed made by any bookkeeping apparatus in Chicago or by anything short of a charge against plaintiff's account with defendant in San Francisco upon written authorization, received and alive.

This finding controls the case. As we shall show, it renders defendant's basic arguments pointless.

Now defendant does not assail the finding. It simply ignores it entirely. Yet the sole question can be this: Is the finding supported by the evidence? We therefore demonstrate that it is.

The Evidence Supports the Finding Overwhelmingly.

The agreement between the parties governing collections was composed of (a) the writings and documents used, (b) uniform usage and custom of banks relative to the meaning of the particular documents, (c) the uniform practice between plaintiff and defendant in such cases, and (d) the agreement between "Lofendo" and defendant.

The Document Used Was a "Collection Letter," Which Differs from a "Cash Letter."

The 6 checks for \$113,216.50 and the 4 checks for \$89,813.10 (discussed at pp. 16-25, *infra*) were sent by defendant to plaintiff

by "collection letters", not by "cash letters". (So admitted, Br. 14-16; also R. 1175-76, 1268.)

The difference between "cash letters" and "collection letters" is a major fact in the case and was so recognized by all at the trial (R. 411, 412). The parties stipulated (R. 1186) thus:

"In the banking business throughout the United States checks are transmitted by banks to other banks for collection either by means of 'cash letters' or 'collections letters'.

*"In the case of cash letters, the forwarding bank, when it receives the check from its depositor, gives credit to him at once. * * * A bank to which a cash letter comes gives credit to the forwarding bank for the entire amount of the letter immediately upon receipt of the letter. If any item thereafter is uncollected or unpaid, a charge back may be made of the amount thereof within a given time, the time being prescribed by contract, statute, or rule of a clearing house. In case of a cash letter, the collecting or intermediate bank does not give advice to the forwarding bank of collection but only of rejection. A cash letter contains no instruction on how to remit the funds when collected, and the forwarding bank assumes collection unless advised of rejection.*

*"In the case of a collection letter covering checks, the forwarding bank does not, upon receipt of such check by it, give credit to the depositor or to the bank from which the item comes. * * ** The collection letter contains instructions on (a) how to remit the funds, when collected, to the forwarding bank, and (b) on how to advise the forwarder of collection. * * * Items covered by collection letters do not go through clearing houses. Items covered by cash letters may. *In the case of a collection letter the forwarding bank does not assume collection until advised thereof."*

The bulk of bank collections is handled by cash letter. But where doubt is entertained that the paper is good, collection

letters are used.⁹ Their use means a different contractual arrangement. Where cash letters are used, the items are regarded as paid unless advice of rejection is given within a specified time. Where collection letters are used, the items are treated as unpaid, until the funds are transmitted or advice of payment is received and acted on.

The Practice of Defendant with Respect to Plaintiff.

The uniform practice covering items forwarded by defendant to plaintiff on collection letters was this: A charge to plaintiff's account was never made until after written advice of credit was actually received or, in exceptional cases, until advice was received by telegraph or telephone. But advice *had* to be received in some form. Defendant's "trouble-shooter" (R. 175) testified (R. 181): "With respect to charges against the account of Merchandise Bank resulting from alleged collections sent on to Merchandise Bank it had always been the uniform practice * * * that no charge would be made against the account of the

⁹Munn's Encyclopedia of Banking and Finance contains the following:

"Letters":—"Letters are of two sorts—cash and collection. Cash letters are those for which the depositor receives credit for the amount of the total footing upon receipt. * * *"

"Collection letter":—"A letter of transmittal * * * accompanying a collection item, i.e. one to be credited to the sender's account only if and when collected. * * *"

"Collection items":—"Checks, drafts * * * deposited with a bank for credit only if and when collection and payment is made, as distinguished from cash items (q.v.), which are credited to the customer's account upon receipt, but which are subject to cancellation in case of non-payment. Most items deposited are cash items. Collection items are those where some doubt is entertained by the depositor of their eventual payment, and they are therefore accorded individual treatment * * *."

Defendant's brief (p. 19) refers to a conversation between LeRoy of plaintiff and Duncan of defendant about certain checks (not those here involved) sent by plaintiff to defendant. These were sent by cash letter (R. 1171).

Merchandise Bank unless * * * a written paper of some kind constituting an authorization to make the entry, had been received from Merchandise Bank.”¹⁰

Defendant’s branch manager testified (R. 352):

“that it was not the custom or practice of [the] branch in [its] dealings with Merchandise National Bank to instruct the head office to charge Merchandise’s account until a written authority to do that was in hand received from Merchandise,” that “*we will never pass entry until we have an advice of credit*” and that we “have to have something to support any entry of that sort, and it was always the practice to wait until some written instruction was received from Merchandise on collection items before passing credit to the customer and instructing the head office to charge Merchandise.”

Other Evidence.

Other important evidence supporting the finding consists of (1) defendant’s contemporaneous conduct and (2) its contract with its customer “Lofendo”. Since presentation of these matters involves citation of cases and statutes, we defer it to the argument (pp. 57-59, 83-85, *infra*), where we also consider the meager evidence on which defendant relies.

4. THE FOUR CHECKS FOR \$89,813.10.

The second improper charge made by defendant against plaintiff’s deposit account was that for \$89,813.10 (p. 3, *supra*). The facts are covered by Findings XXV-XXVIII, inclusive (R. 108-111).

On November 6, 1948 United Produce drew 4 checks aggregating this sum on its account with plaintiff payable to itself under the name “Lofendo”. Defendant’s branch received them on November 10th, the day it reiterated its imperative instruction that no “Lofendo” items were to be received except for collection.

¹⁰Similar testimony of the same witness appears at R. 197.

Having regard for these instructions, its employees gave no credit on the checks, received them as agent for collection only, and sent them to plaintiff under a collection letter.

Plaintiff received the collection letter on November 12th. The same fraudulent state of affairs existed then as on November 15th when the 6 checks for \$113,216.50 arrived, and, misled by the fraud, plaintiff's employees mailed to defendant an advice of credit for \$89,813.10 (Finding XXV, R. 108, 109).

Defendant received this advice of credit on November 16, 1948. *But it did not act on it until after the telephone conversation with Mr. Messenger on November 17th and the conversations with Mr. LeRoy on November 18th. And defendant never paid out one cent to anyone nor ever changed its position in reliance on it.*

The court found (Finding XXV, R. 109-110):

"that defendant did not at any time * * * change its position in any way to its detriment in reliance upon said advice of credit; that the said advice of credit had been received by the defendant on November 16, 1948, but it was not acted upon until November 18, 1948, and then only in the circumstances found below in Paragraphs XXVI, XXVII and XXVIII."

And also (Finding XXVII, R. 110, 111):

"three days later, on November 19, 1948, defendant charged the sum of \$89,813.10 against plaintiff's deposit account with it, and on November 18, 1948, it entered a credit to the 'Lofendo account' for \$89,813.10; that defendant predated the charge against plaintiff's account as of November 18, 1948, and it predated the credit to the 'Lofendo account' as of November 17, 1948."

Reason for Defendant's Conduct.

The circumstances in which defendant sought to take advantage of the advice of credit for \$89,813.10 are similar to those in

which defendant sought to take advantage of the advice of credit for the \$113,216.50, and its action was equally crass.

We have seen how defendant carelessly gave immediate credit to the Lofendo account on November 16 for \$97,207 worth of checks received for deposit and honored checks drawn on that account for over \$109,000, thereby sustaining a loss of over \$96,000.

Almost simultaneously defendant honored another 3 checks totalling \$75,586.86 drawn on the account, and thus sustained a loss in that amount as well. These 3 checks arrived at defendant's branch on November 15th under cover of cash letters¹¹ (Finding XXVII, R. 110). There were insufficient funds in the account to pay these checks. Nevertheless, as defendant admits (Br. 40) and as the court found, the defendant was out-of-pocket on these checks prior to November 17th (R. 111).

As the parties stipulated, when checks are sent by "cash letter" the forwarding bank takes an immediate credit and the receiving bank an immediate charge, quite different from what is done with checks sent by collection letter (see p. 14, *supra*). As checks sent under cover of cash letters pass through a clearing house, the charges and credits are there made at once. The receiving bank, in a cash letter case, may charge back the items, provided it does so within a time prescribed by contract, clearing house rules or statute. It is admitted that the time for charge-back, in the case of the checks for \$75,586.86, expired on November 16th. The time was permitted to elapse by defendant's negligence, sheer oversight of the fact that the checks were "kicking around" the bank (see pp. 25-26, *infra*). And so defendant then sustained its loss.

Defendant's officers did not know these facts until late on November 18th (see p. 11, *supra*). The advice of credit for the \$89,813.10 reached defendant on November 16th *after* it had

¹¹The checks arrived in the "in-clearings" (R. 1181), i.e., through the clearing house (e.g., R. 960). Since only cash letter items come through clearing houses (p. 14, *supra*), these were cash letter items, as found.

paid out the \$109,000 (Finding XXVII, R. 110), the last sum ever paid by it against the "Lofendo" account.¹²

There Is No Element of Estoppel on This Item Either.

As the court found:

"before *anything was done* by the defendant on the basis of said advice of credit for \$89,813.10, plaintiff had communicated with defendant on November 17, 1948 * * * and again on November 18th * * * and the plaintiff on both occasions informed the defendant that United Produce Company had defrauded the plaintiff of a large sum of money exceeding \$500,000 and had done so by means of fictitious and fraudulent checks drawn on the 'Lofendo account'; that *consequently, defendant never became a bona fide purchaser for value of the \$89,813.10 or any part thereof;*" (Finding XXVIII, R. 111; and see Finding XV, R. 103).

On November 19th defendant charged the sum of \$89,813.10 against plaintiff's deposit account, preceding this by a credit of the same amount to the "Lofendo" account. As found (Finding XXVII, R. 111):

"until that credit was so entered, there were not sufficient funds in the 'Lofendo account' against which to charge the checks for \$75,586.86 which had *theretofore* been paid, and the purpose of making the entry was to supply funds against which to make the charge; that thereupon the checks for \$75,586.86 were charged against the credit so created in the account."

Thus defendant never acted to its detriment in reliance on the advice of credit for \$89,813.10. Its charge of that sum against plaintiff's account and concurrent credit to the "Lofendo" account was an effort to reimburse itself for losses *already* incurred

¹²Defendant's brief (p. 41) states that it had until the end of November 17th to pay the \$109,000. But in fact those checks were immediately paid on November 16th and charged against the account as of November 15th (Stipulated, R. 1182).

through its own negligence and as a result of violation of its own instructions, i.e., the \$75,586.86 and part of the \$109,000. Neither of these payments had been made in reliance on the advice of credit or in any supposition that the \$89,813.10 of checks had been collected.

And when defendant finally attempted to charge plaintiff's account, it was already on notice that United Produce and Lofendo as a participant had defrauded plaintiff out of more than one half million dollars.

Trial Court's Conclusion as to the \$89,813.10.

The trial court concluded:

"That after the 17th day of November, 1948, defendant had no authority or right to pay to 'Lofendo' or itself, in discharge of any obligation of 'Lofendo' to it, the sum of \$89,813.10" (Conclusion VIII, R. 115).

The Evidence Supports These Findings.

Defendant realizes that its case as respects the \$89,813.10 vanishes unless it can upset the findings. The elementary legal principle is discussed at pages 65 et seq., *infra*. And because of this realization, defendant tries to juggle events so as to place its action on the advice of credit for \$89,813.10 at a moment of time earlier than the Messenger-Estribou telephone conversation of November 17th (e.g., Br. 43-57).

The sole question is: Are the findings supported by the evidence? And the answer is clearly so.

The charge of the \$89,813.10 appears in plaintiff's account on defendant's books under date of November 18th (P. Ex. 1),¹³ and under defendant's system of bookkeeping (R. 609) this means that the charge was not made until the 19th. The court's finding to that effect is therefore supported.

Defendant asserts (Br. 43) that the sum of \$89,813.10 was credited to the "Lofendo" account on November 17th, instead of

¹³By order of this Court the printing of this exhibit was not required.

on the 18th as the trial court found. But on the afternoon of November 18th Mr. LeRoy, plaintiff's executive vice president, was in the office of Mr. Duncan, the defendant's authorized officer (R. 447, 451). LeRoy testified that in his presence Duncan then telephoned to Estribou, defendant's branch manager, and reported back to LeRoy that *the situation was the same as the day before, i.e., that the balance in the Lofendo account was still only \$690* (R. 455). The trial court believed Mr. LeRoy, and this evidence means, of course, that the \$89,813.10 had even then not yet been credited to the "Lofendo account", for the ledger sheet of the Lofendo account shows that when that sum was credited it increased the balance from the \$699.02 which had been the balance for several days (D. Ex. 2).

In an effort to defer the moment of the Estribou-Messenger telephone conversation, defendant cites Estribou's testimony that the branch's collection department was closed at the time, and so he could not tell Messenger definitely whether the advice of credit for the 6 checks had been received (Br. 62). But Messenger's testimony was that Estribou called for his records (R. 221, 247) and, with them before him, made a positive statement that the advice of credit had not arrived (R. 223). The trial court believed Messenger.

Recognizing that the making of the various book entries occurred *after* it was on notice, defendant next tries to sever the *book entries*, by which charges and credits are made, from what it calls "the banking operations" (Br. 62). But the trial court found against the defendant, not only as to the time of the entries, but also as to the time of anything that might be called "banking operations" on the subject (Finding XXVII and XXVIII, R. 110, 111). It found that "before *anything* was done by defendant * * * on the basis of said advice of credit," it was on notice (p. 19, *supra*). The evidence already related supports these findings.

Next defendant assails the finding that on November 17th and 18th plaintiff informed it that United had defrauded it of a large sum of money exceeding \$500,000 and had done so by means of fictitious and fraudulent checks drawn on the Lofendo account (Br. 58).

When Messenger telephoned to Estribou on November 17th he not only said that United had defrauded plaintiff of a large sum of money, he did something *much more striking*. He read to Estribou a list of the checks drawn on the "Lofendo" account which plaintiff had sent to defendant for payment since November 4th, and he asked if these checks had been paid. Mr. Estribou examined his own records and gave Mr. Messenger information showing that over \$500,000 of them had not been paid. He also said that the account had in it only \$690 (R. 221-224). That meant that the \$500,000 of checks were worthless paper. Those checks had been sent to defendant by "cash letter" (R. 1171, 1172). This meant that plaintiff had already given United credit on them (see p. 14, *supra*; also R. 229).

On the next day, November 18th, plaintiff's officer, LeRoy, explained the situation even more fully to defendant. He told it that the fraud was worked largely by means of a group of fictitious checks drawn on the Lofendo account (R. 450) *upon which plaintiff had given credit to United Produce* (R. 449, 450). He showed defendant the list of the items (R. 451). He too did something *more striking*. At defendant's request (R. 454) he wrote it a letter in its offices (P. Ex. 10, R. 1171, 1176) listing the checks, which totalled several hundred thousand dollars. The letter showed that about \$500,000 of the checks had been received by the plaintiff from United Produce prior to November 12th.¹⁴

¹⁴Cf. Finding IX, R. 99: "between November 4th and November 12, 1948, plaintiff received from United Produce Company over \$500,000 of checks drawn by United Produce Company on its 'Lofendo account'."

On the same day, November 18th, Mr. LeRoy and defendant's Mr. Duncan located many of the checks in the defendant's Central Transit Office, en route to the Bakersfield branch (R. 453). Defendant's authorized officer thus saw their dates. Furthermore, LeRoy told defendant that "Lofendo was a participant in the fraud" (Testimony of defendant's witness Johnson, R. 698).

This all adds up to a picture that must have been obvious to the most reluctant intelligence: the credit balance on November 12th in United's account with plaintiff, on the basis of which the advice of credit was mistakenly sent out that day, was a "phony," created by the allowance of credits based on checks drawn on defendant which defendant knew to be worthless.

Surreptitiousness of Defendant's Conduct.

The very surreptitiousness and secretiveness of defendant's conduct supports the findings.

In the Messenger-Estribou telephone conversation of November 17th, Estribou told Messenger not only that the \$113,216.50 advice of credit had not been received, but also that only two collections sent to plaintiff by defendant's branch were still outstanding, one the \$113,216.50 item and the other for \$52,379 (R. 310, 400, 401). These statements necessarily conveyed the idea that defendant had already received the \$89,813.10 advice of credit.¹⁵ Estribou further told Messenger that the Lofendo account had a balance of only \$699.02, and that defendant had been paying only against collected funds (R. 224).

If the balance was only \$699.02 after crediting \$89,813.10, and if defendant had been paying out only against collected funds, it would appear that defendant had already paid out funds and changed its position in reliance on the \$89,813.10 advice of credit. Mr. Messenger made this assumption, and consequently

¹⁵The \$89,813.10 collection letter was dated November 10th, the \$113,216.50 letter November 13th, and the \$52,379 letter November 15th (R. 1182).

plaintiff did not mention this advice of credit then or in the conversations of November 18th (R. 312).¹⁶

As the court found (Finding XXV, p. 109):

“on November 17, 1948, when the plaintiff telephoned to the defendant as found in Paragraph XIV above, defendant stated to plaintiff that only two collection letters theretofore sent by defendant’s branch to the plaintiff were outstanding; one for the \$113,216.50 and a later one for \$52,379.00, and that there was a balance of only \$699.02 in the ‘Lofendo account’; that plaintiff reasonably assumed from this statement that the advice of credit for \$89,813.10 had already been received and acted upon by the defendant and that in reliance thereon the defendant had changed its position; that consequently, neither then or on November 18, 1948, did plaintiff speak or write to defendant relative to the \$89,813.10;”

The finding adds:

“but in fact, at the time of said telephone conversation the advice of credit for \$89,813.10 had not yet been acted upon by defendant in any way whatsoever;”

As we have already seen, late on November 18th defendant learned of its own employees’ negligence. It then decided to violate its agreement about not charging plaintiff’s account with the \$113,216.50. It is evident that it also decided to charge the \$89,813.10. But it concealed from plaintiff the fact that it had not already done so. During preparation for trial, plaintiff’s counsel took depositions of defendant’s officers and learned of a report of an investigation made by its Cashier’s Department. But defendant refused to produce the document under a claim of privilege (R. 73). After repeated demands, defendant finally produced the document near the close of the trial (R. 75-79). And thus the truth came out.

¹⁶Before telephoning, Mr. Messenger had been told by plaintiff’s general counsel that an advice of credit could be revoked if not yet acted on (R. 257).

As the trial court found (Finding XXVIII, R. 111):

“not until the trial of this cause did plaintiff discover that defendant was not a bona fide purchaser for value of said sum and that it had never changed its position to its detriment in reliance on said advice of credit for \$89,813.10.”

The complaint was amended accordingly to conform to the proof (R. 61, 821, 827).¹⁷

The reason for the concealment is obvious. Defendant knew that if the fact came out, plaintiff would seek recovery of the sum of \$89,813.10 as well as of the sum of \$113,216.50.¹⁸

Negligence of Defendant's Conduct.

Defendant was negligent in honoring the checks for \$75,586.86 drawn on the Lofendo account, just as it was in honoring the checks for \$109,000. The fact that defendant was negligent is no affirmative part of plaintiff's case. But it answers defendant's attempt to impose on plaintiff the loss defendant sustained.

When the 3 checks for \$75,586.86 arrived under cover of cash letters on November 15th, “there were not sufficient funds in the account to pay them, but defendant's employees negligently failed to reject the checks” (Finding XXVI, R. 110). The next day, defendant gave an immediate credit to the “Lofendo” account for checks totalling \$97,207, already discussed (p. 11, *supra*). Had the \$75,586.86 then been charged against the account, the apparent credit balance created by the credit for \$97,207 would have been so reduced that there would have been no balance, even apparent, against which to honor the checks for \$109,569.15, which arrived the very same day, as already noted (p. 11, *supra*). But defendant “failed to charge the checks for \$75,586.86 against

¹⁷Defendant moved to strike the amendment, the motion was denied when the case was decided (R. 95), and defendant assigns no error relative thereto.

¹⁸When plaintiff's counsel rose during the trial and announced that he wished to amend the complaint to conform to the proof, and before he had stated what the amendment was to be, defendant's counsel remarked, “Here comes the eighty-nine thousand” (R. 70, admitted, R. 89).

the 'Lofendo account' and permitted them to continue to lie around its branch" (Finding XXVI, R. 110).¹⁹ It paid the \$75,586.86 without noting the fact on the *Lofendo* ledger sheet, and defendant then paid out the \$109,000 against the account as well.

ANALYSIS OF THE CASE: THE ISSUES STATED; SUMMARY OF ARGUMENT

Because banking transactions involve many entries and papers, they tend to seem complicated. Defendant has sought to capitalize on this apparent complication. But, just as the findings show the facts to be simple, a preliminary analysis will do the same for the issues.

This Is a Suit on Plaintiff's Account with Defendant, Not on any Checks.

Contrary to defendant's repeated assertion (e.g., Br. 2, 56), this is *not* a suit upon the 6 checks for \$113,216.50 or the 4 checks for \$89,813.10.

Plaintiff was a depositor with defendant, and this is an action to recover the funds deposited. Plaintiff being a depositor, defendant was its debtor. And payment being an affirmative defense, it was incumbent on defendant to prove that it had paid plaintiff what it owed.²⁰

The checks enter the case only because defendant brings them in as the basis of an alleged defense of payment—as the excuse

¹⁹It was stipulated (R. 1183) that the credit of \$97,207 "created an apparent balance * * * against which * * * the \$75,586.86 * * * could have been charged, but for some reason which the defendant was unable to explain, they were not." The explanation is obvious enough. Defendant's employees on November 15th had listed the \$75,586.86 of checks for rejection but then proceeded to overlook them for several days (R. 1183).

²⁰This is California law, *Lloyd v. Kleefisch*, 48 C.A.2d 408, 416, 120 Pac.2d 97; *Hansen v. Bear Film Co.*, 28 Cal.2d 154, 181, 168 Pac.2d 946. The rule applies in the federal court in a diversity case, 2 *Moore's Federal Practice*, 2d ed. pp. 1687-1691; *Person v. United States*, 112 F.2d 1 (8 Cir.), cer. den. 311 U.S. 672.

for its unconscionable refusal to pay plaintiff the full balance in the account. Defendant seized that balance in order to make itself whole *for a loss of its own*. That loss was sustained when defendant's employees honored two groups of checks drawn on the Lofendo account aggregating about \$185,000 against a balance of only \$13,000 (R. 1181). And those checks were totally unrelated to the 6 checks or the 4 checks (see pp. 10-12, 18-19, *supra*).

No One Ever Suffered a Loss by Reason of the 6 Checks for \$113,216.50 or the 4 Checks for \$89,813.10.

Repeatedly defendant speaks of a "loss" suffered by reason of the 6 checks and the 4 checks, and it poses the question as being who should suffer this "loss" (e.g., pp. 5, 11, 89).

But there is no such loss. No funds were paid out to anyone either by defendant or plaintiff upon these checks or by reason of them (pp. 12, 17, *supra*).²¹ The trial court found (Finding XXIX, R. 112):

"that it is not true that the defendant, or plaintiff, or anyone else, has ever suffered any loss by reason of the 6 checks for \$113,216.50";

The court continued by finding (R. 112):

"that the plaintiff has been damaged by reason of defendant's refusal to pay to plaintiff the balance in plaintiff's account with defendant, and one of defendant's reasons for refusing to pay to plaintiff the amount of the balance was that defendant was entitled to charge the sum of \$113,216.50 against plaintiff's account; but no one has suffered any loss by reason of the 6 checks for \$113,216.50, since the defendant paid out no funds and did not act in any way to its detriment in reliance on said 6 checks or anything connected therewith;"²²

²¹As said in another case, "It will be observed from the recitation of the peregrinations of this check that it produced much bookkeeping, but no cash." *Lincoln County v. Gibson*, 255 Pac. 119, 120 (Wash.).

²²The findings as to the 4 checks for \$89,813.10 are similar (see pp. 17, 19, *supra*).

Stating that plaintiff has sustained a loss at the hands of United Produce in excess of \$500,000, defendant asserts that the judgment permits the plaintiff to recover \$203,047 of this amount from defendant (e.g., Br. 15).

This is not so. On the contrary, defendant simply tries to use the checks as a tool to palm off its loss onto the plaintiff. Plaintiff did suffer that loss, but it is quite apart from the checks here involved. Defendant also suffered a loss at the hands of the same swindler. Each of the two banks was defrauded by the same party, and the 6 checks and the 4 checks have nothing to do with the loss of either.

The fallacious assumption about a "loss" underlies a variety of defendant's arguments, e.g., the whole of its argument about plaintiff's alleged negligence.

The Advice of Credit Passes Out of the Case.

Plaintiff's deposit account with defendant was like the deposit account of any other customer. A debtor bank has no right to deduct anything from the amount owed its depositor, its creditor, unless it has an order from the customer authorizing it to do so, or unless the creditor becomes legally indebted to the debtor so as to permit an offset.

Certainly the plaintiff never authorized the defendant to charge its account with \$113,216.50. The "advice of credit" was no such authorization, because it was revoked before its receipt by defendant. An order revoked before acted on is no order at all.

For example, plaintiff could have torn it up before mailing, or could have procured it back from the post office before its delivery to the defendant. If these things had happened, the advice would have been ineffective to alter anyone's rights. It is so held in *Steinhart v. National Bank*, 94 Cal. 362, 29 Pac. 717, in the oft-cited case of *Guardian National Bank v. Huntington County State Bank*, 187 N.E. 388, 206 Ind. 185, and the recent case of

Boblig v. First National Bank, 48 N.W.2d 445 (Minn. 1951).

The advice of credit is therefore as irrelevant as if it had never come into being.

The trial court correctly concluded:

"That the rescinded and cancelled advice of credit is not and cannot be the basis for credit, claim, charge or set-off by defendant against plaintiff" (Conclusion IV, R. 114).

Again:

"That defendant never acted to its detriment in reliance upon the rescinded and cancelled advice of credit" (Conclusion V, R. 114).

Defendant does not seriously contend otherwise.²³

While the advice of credit for the \$89,813.10 was received by defendant, it did not act upon it before notice of the fraud. Thereafter, as we shall show, at pages 64-78, *infra*, it had no right to act on it.

²³It does make a passing argument (at pp. 70-71) that the advice of credit was "delivered," citing *People v. LaRue*, 28 C.A.2d 748. That case involved venue in a criminal charge, under Cal. Penal Code, Sec. 476(a), of "uttering and delivering" a check by mailing to a creditor in payment of a purchase. The court held that deposit of a negotiable instrument in the post office addressed to a payee constitutes "uttering and delivering," absent anything indicating that the carrier of the letter is the sender's agent.

The "advice of credit" was not a negotiable instrument—it was a mere order to the debtor bank to charge the account of the creditor depositor. In another context defendant cites 9 C.J.S. 502, but fails to note this statement:

"The fact that the drawee bank deposits in the mail a cash letter giving credit to the payee bank does not create a payment where the letter is subsequently withdrawn from the mail, since the post-office may be regarded as an agent of the sender so long as the communication may be withdrawn by it, and intrusting a letter of credit, or actual funds, to an agent does not constitute payment until delivery of the letter of credit or funds, and for this purpose it is immaterial whether the transaction constitutes mere payment or the acceptance of an offer."

There Is No Element of Estoppel Against Plaintiff.

It is next to be emphasized that no element of estoppel exists against plaintiff. The defendant knew nothing about the advice of credit until its revocation, nothing of the perforation of the checks until it received them back on November 22, 1948 (R. 102, 1179) already bearing the notation "Cancelled in error," and nothing of the Chicago bookkeeping entries until after this lawsuit was started. Although it inferred that those entries had occurred when it heard that an advice of credit had been sent out in error (R. 351), it was then simultaneously placed on notice. *And, of course, it never paid out a penny or changed its position in reliance on any of these things.*

The trial court so found and concluded that there was no estoppel (pp. 10, 12, 19, *supra*).

At various places defendant asserts that its "position was changed by the Merchandise's payment of the checks" (e.g., Br. 105) or that it will be "prejudiced" by plaintiff's recovery (e.g., Br. 103, 104, 107). Such statements are Vyshinsky English: the words are used in a private sense as the end product of involved arguments. Defendant merely means that when it pays the judgment it will have that much less money. It cannot mean that anything plaintiff did relative to the 6 checks or the 4 checks has imposed loss on it or led it to change its position.

The Question Is Whether Defendant Could Have Sued Plaintiff for the \$113,216.50 and the \$89,813.10.

Defendant assumes that this case turns on a determination of what type of acts constitutes "payment" of checks by a bank to which they are sent for collection. And it would make that determination by applying—not a common sense rule—but an artificial and mechanical concept of the effect of the bookkeeping entries in Chicago.

But, of course, to use the term "payment" is Pickwickian. The existence of plaintiff's deposit account with defendant afforded

defendant an opportunity to try, by extra-legal means, to assert that plaintiff had become indebted to it. If there had been no such account, defendant would have had to sue plaintiff, if it wished to assert its claim. And its claim really is that plaintiff was obligated to pay it, not that it had paid. It follows that the question comes to this: Did the mere bookkeeping entries in Chicago and the perforation of the checks create an indebtedness *of plaintiff* for their sum? If so, did they create such an indebtedness *to defendant*? And if so, did they do so beyond revocation?

Advancing one step further, the question must come to this: could the defendant, Bank of America, have sued the plaintiff for \$113,216.50 or for \$89,813.10?

Summary of the Discussion to Follow on This Question.

We shall demonstrate that there was no "collection" or "payment" of the checks (pp. 78-99, *infra*). But that question need not be reached because there are three other answers, each complete and independent:

1. Since defendant took the checks for collection only and gave no credit on them to anyone, not even provisional, it never became a holder of the checks, much less a holder in due course. It was only an agent of "Lofendo" for collection.

Under the so-called "Massachusetts rule," which prevails in both California and Illinois, plaintiff too was "Lofendo's" agent for collection, and it was neither an agent of defendant nor defendant's debtor relative to these checks. Under this rule, the forwarding bank (defendant) has no claim against the collecting bank (plaintiff).

Consequently, defendant has no standing to assert that there was collection or payment, for it may not substitute itself as a creditor in the payee's place; it may not seek to offset a debt allegedly owed by plaintiff to defendant's principal "Lofendo" against a debt owed by defendant itself to the plaintiff. (See discussion, pp. 36 to 40, *infra*.)

2. If defendant did have a standing to assert that the checks had been paid, its rights could be no greater than those of United Produce Company. But the latter has no rights against plaintiff under any rule, however mechanical. "Lofendo" was United Produce Company, and it is universally held that when a payee [Lofendo] and the drawer [United Produce] are the same, it can acquire no rights against the drawee bank as the result of a check drawn against insufficient funds or as part of a fraud worked by the drawer.

The identity of Lofendo and United Produce washes away a variety of defendant's arguments, which concern the rights of innocent payees. In view of its fraud on plaintiff and the lack of funds in its account in Chicago, United Produce never had any rights against plaintiff by reason of the 6 checks or 4 checks.

The only way defendant could acquire any rights at all against plaintiff by reason of the checks was through "Lofendo," i.e., United Produce. And so the essence of its case is that, somehow, it secured through the defrauder United Produce greater rights against plaintiff than United Produce itself would have, to compel payment of the checks.

One can obtain greater rights in checks than the payee in two ways only: (1) by becoming a holder in due course or purchaser for value before notice or (2) by operation of estoppel. Here defendant was not a holder at all. Nor was there an estoppel, because defendant never paid money or changed its position in reliance on the checks or on an assumption that they were collected.

Although defendant tries to assert a "better right" than Lofendo by an argument about acquiring a "lien" on the checks, it never had a lien, and it finally so admits.

Defendant also tries to assert a "better right" by arguing that plaintiff's internal bookkeeping in Chicago automatically transmuted plaintiff's relationship from that of agent for "Lofendo" into that of debtor to defendant, and likewise converted defend-

ant's agency for "Lofendo" into a debt to him. No such transmutation occurred; but even if it did, defendant's conclusion would not follow. A change in relationship could only arise from a contract between plaintiff and defendant, whereby plaintiff promised to pay the sums to defendant in consideration of defendant's promise to assume plaintiff's alleged obligation to the payee. But there was no consideration for such a contract, since plaintiff had no obligation to the payee, the latter being identical with the defrauder United Produce.

Moreover, defendant's contract with "Lofendo," whereby it undertook collection of the checks, precluded any obligation by it to him from arising merely upon book entries in Chicago or upon anything short of defendant's obtaining good funds in hand.

Furthermore, any supposed contract whereby plaintiff promised to pay defendant on defendant's promise to pay "Lofendo" was rescinded by the agreement entered into between plaintiff and defendant on November 17 and 18, 1948, as found by the trial court. (See discussion at pp. 41-65.)

3. Even if there were "payment," the plaintiff is entitled to revoke and recover. In this connection we shall note that the factual difference between the events surrounding the \$89,813.10 and the \$113,216.50 is not relevant.

Plaintiff's right is clear under California law, which controls this question. If payment had been made directly to "Lofendo," i.e., United Produce, plaintiff could recover in view of United's fraud. Where payment has been made to an agent in circumstances in which it could be recovered from the principal if made directly to him, it can be recovered from the agent unless the latter has, before notice of the fraud, paid the money over to or for his principal. Nor may an agent apply the money on debts due himself from the principal after such notice. Cf. *Weiner v. Roof*, 19 Cal.2d 748. The trial court found that defendant did nothing until after such notice.

Defendant tenders almost no answer relative to the \$113,216.50, and its answer relative to the \$89,813.10 is largely a quarrel with the findings, which are amply supported. (See discussion, pp. 65-78, *infra*.)

Summary of the Discussion re "Payment."

In fact, the mere bookkeeping entries in Chicago were not "payment." Defendant's entire argument is vitiated by the major fallacy of ignoring the facts of this case as to the nature of the collection contract.

Collection arrangements are contractual, between holder of the check, forwarding bank and collecting bank. Every cited case turns on the contract proved and found. Here the trial court found that, under the contract, collection and payment of checks sent by defendant to plaintiff were consummated only by a charge made against plaintiff's account on defendant's books in San Francisco pursuant to an outstanding authorization to make it. And nothing short of that could change the relationship of the parties whereby both plaintiff and defendant were merely the payee's agent.

This finding is supported by an overwhelming mass of evidence, including settled custom and usage, the course of dealing and practice between the parties, contemporaneous construction by conduct, the contract between "Lofendo" and defendant. And one of the major facts is that the collections were carried on under "collection letters" and not "cash letters."

Defendant's citations are not in point because they involve different contractual arrangements; e.g., they are "cash letter" cases. In citing them defendant ignores the stipulated difference between cash letters and collection letters and the significance of the two.

Defendant's arguments also confound the different senses in which "payment" is used. For example, from the standpoint of a maker's right against the drawee bank to stop payment or from

the standpoint of one depositing with a bank a check drawn upon it, a check may be paid. But from the standpoint of transmission of funds by a collecting bank to a forwarding bank, the tests are different.

A third fallacy lies in citing cases involving the rights of holders in due course, or not involving fraud or mistake. A fourth fallacy lies in citing cases from jurisdictions which proceed on basic assumptions of law contrary to those prevailing in California and Illinois.

Defendant's Charges of Negligence and Misrepresentation on Plaintiff's Part Constitute No Defenses but Mere Assertions of Counterclaims.

A quarter of defendant's brief is devoted to charges of negligence and misrepresentations on plaintiff's part (Br. 72-107). While defendant speaks of these matters as a defense to the complaint, they have nothing to do with a defense; they are affirmative counterclaims for the recovery of defendant's own loss. The slightest reflection so demonstrates. If the 6 checks for \$113,216.50 or the 4 checks for \$89,813.10, all drawn on plaintiff bank, had *never* existed, defendant would still have sustained *its* loss, and its claim against the plaintiff therefor would be neither better nor worse than it is now.

Its loss resulted from honoring checks drawn on itself. And payment thereof was in no way made in reliance on the 6 checks or the 4 checks (p. 27, *supra*), nor, as found, was it caused in any way by or in reliance on anything plaintiff did or failed to do.

We discuss these matters at the end of this brief (pp. 99 to 115).

DISCUSSION

I.

Defendant Has No Standing to Assert That the Checks Were Collected. It Is Not a Real Party in Interest to Assert the Claim.

As said in 8 Zollman on Banks and Banking, p. 116, in determining "the liability of the various banks in a chain of collection",

"It is * * * important to discover the precise relation of the bank to the check, whether owner or merely collecting agent."

Defendant's Relation to the Checks:—It was Never the Owner but Only United Produce's Agent.

A bank may take paper in three ways: (a) it may discount, i.e., buy, the paper for cash or credit. In that event it becomes the owner. (b) It may give a credit but by agreement make the credit conditional and take the paper for collection. In that event it does not become a holder in due course until and unless the customer draws against the credit before notice to the bank of an infirmity, and then only to the extent that he does so.¹ In the meanwhile it is only an agent for collection. (c) Or it may give no credit at all, not even provisional, in which event it is solely an agent of the owner.

If it takes a check for collection, passing no credit to the account of its customer, it acquires no title to the check and has no beneficial interest. It does not become the customer's debtor but only his agent.

Since defendant concedes that this is the law (Br. 29, 30), we need not dwell on the authorities.²

¹Annotation, 80 A.L.R. 1064; *Bath National Bank v. Sonnenstrahl*, 164 N.E. 327, 249 N.Y. 391; *Pacific Acceptance Corp. v. Goodman*, 72 C.A. 143, 236 Pac. 964.

²The rule is stated in *National Bank of New Zealand v. Finn*, 81 Cal. App. 317, 336, 253 Pac. 757, citing 3 R.C.L. 633. So also, *Grower's Marketing Service v. Webster & Atlas National Bank*, 62 N.E.2d 225, 318 Mass. 496; 8 Zollman on Banks and Banking, pp. 351, 354-356, 371, Sec. 5601; 6 Michie, Banks and Banking, p. 4.

This was the situation here with respect to the 6 checks for \$113,216.50 and the 4 checks for \$89,813.10. Defendant took the checks for collection only; no credit whatever was given, much less drawn against (see pp. 7, 12, 17, *supra*).

A fortiori, the bank did not become a holder in due course, for it did not become a holder at all.

The payee or holder of the checks was "Lofendo", i.e., United Produce (p. 4, *supra*). In short, defendant was merely an agent of United Produce to collect the checks. Defendant so admits (Br. 29).

**Defendant's Relationship to Plaintiff as Respects
the Checks: Both Were the Payee's Agents.**

The trial court concluded:

"That plaintiff and defendant were the agents of 'Lofendo' in effecting collection of the checks forwarded for collection" (Conclusion II, R. 114).

There are two different rules regarding the relationship of forwarding bank and collecting bank in collections, the "New York rule" and the "Massachusetts rule". Under the New York rule the bank to which the paper is sent, the collecting bank, is the agent of the forwarding bank. Under the Massachusetts rule no relationship at all exists between the two banks. The collecting bank, as well as the forwarding bank, is the agent of the owner of the paper. 8 *Zollman on Banks and Banking*, p. 114.³

³There used to be a "federal rule," similar to the New York rule, but since *Erie Railroad Company v. Tompkins*, 304 U.S. 64, there is no longer such a thing as a federal rule in any field. The recent case of *First Trust & Savings Bank of Oneida v. Kent*, 119 F.2d 151 (6 Cir.) so recognizes in the field of bank collections (p. 155).

Our only reason for mentioning the New York rule is that its existence eliminates the confusion that would otherwise arise from reading many decisions that may be found in the books. As 8 *Zollman on Banks and Banking* says (p. 115):

"The existence of these two rules explains much of the contrariety which exists as to the liability of the various banks in a chain of col-

Both Illinois⁴ and California⁵ follow the Massachusetts rule. Defendant so concedes (Br. 29). Plaintiff was "Lofendo's", not defendant's, agent, and there was no relationship whatever between plaintiff and defendant. Each was the agent of "Lofendo", i.e., of United Produce, as the payee and holder of the checks. Thus 8 Zollman, p. 114 states:

"Under the Massachusetts rule, the initial bank is liable only for the selection of a suitable local agent to whom to intrust the collection and for the transmission of the paper to such agent with proper instructions. Under the New York rule * * * the initial bank becomes an independent contractor. Under the Massachusetts rule, the bank to which the paper is forwarded becomes the agent of the owner."

Defendant Has No Standing to Assert That the Checks Were Collected.

It follows, as Zollman states (p. 126):

"Under the Massachusetts rule, the forwarding bank, being merely an agent for transmission, clearly has no right of action against the collecting bank."

And so defendant, a mere agent for the owner, has no right of action against the plaintiff, itself an agent for the owner. 8 *Zollman*, p. 123.

Defendant simply has no standing to assert that the checks were "collected" or "paid".

Many cases involve the question what constitutes collection or payment of checks. But in all such cases the claim of payment

lection both to each other and to the owner in cases of the insolvency or negligence of any of such banks. * * * Either rule, of course, is confined to cases 'where the bank receives the check for collection, not to those in which it becomes the owner of the check and makes the collection on its own account'."

⁴8 *Zollman on Banks and Banking*, p. 118; *Krueger v. First National Bank*, 217 Ill. App. 18.

⁵So conceded in defendant's brief at pp. 29, 30.

is asserted by the payee or holder in due course—not by a bank in a collection chain where that bank has not first given credit and become the owner.

Defendant asserts that the legal consequences of what transpired in Illinois are governed by Illinois law (Br. 18). The Illinois decisions show that defendant has no standing in the premises. In *Krueger v. First National Bank*, 217 Ill. App. 18, the payee of a draft sent it to defendant for collection, which forwarded it to the Auburn Bank. The latter actually collected the money from the drawee but never remitted or reported the fact to defendant. Later defendant indirectly learned the fact and charged a deposit account maintained by the Auburn Bank with it. It turned over to the Auburn's receiver only the balance. The receiver sued for the deducted amount and recovered judgment.

That case and this are similar. The defendants in the two cases occupy similar positions, as do the plaintiffs. Here, as there, the collecting bank happened to have had a deposit account with the forwarding bank. In view of the revocation of the advice of credit and the notice of the fraud, the present case is the same as if plaintiff had not mailed it at all but subsequently, by accident, defendant learned of the Chicago book entries (p. 28, *supra*). Could defendant then have deducted the \$113,216.50 or the \$89,813.10 from plaintiff's account? *The Auburn case says no.*

The collecting bank, the court said, is not the agent of the forwarding bank but of the payee. When the collection was effected, the payee and not the forwarding bank became the collecting bank's creditor, and the right of action, if any, against the Auburn bank was in the payee and not in the forwarding bank. By trying to deduct the amount of the draft from Auburn's account, defendant there improperly sought "indirectly to substitute [itself] as a creditor in its [the payee's] place." Any other holding, the court noted, would rest solely on the "irrelevant fact

that the Auburn State Bank had an account with defendant bank and the fortuitous circumstance that its credit balance was in excess of the amount of the draft."

In essence, the question is one of right of set-off. If the collecting bank is a depositor of the forwarding bank, as here, it is the creditor of the forwarding bank. And if the forwarding bank has taken the paper only for collection, as here, it is only the payee's agent. It cannot set off its personal debt to the collecting bank against a debt of the collecting bank to the payee arising from the collection. This is so held in *Dakin v. Bayly*, 290 U. S. 143. There, under a Florida statute similar to the California Bank Act, the "Massachusetts rule" applied, that forwarding bank and collecting bank were both agents of the payee. As here, the collecting bank had an account with the forwarding bank. The court said:

"The conclusion is that while the Clearwater bank individually owed the receiver of the St. Petersburg bank, the latter did not owe the former, but at best the claim was made as an agent. If this be true, set off may not be allowed, for a defendant sued upon his individual debt may not avail himself for this purpose of a demand against the plaintiff held in a fiduciary capacity" (p. 146).

In *Bosworth, receiver v. Continental Illinois Bank & Trust Co.*, 291 U. S. 643, the Supreme Court, in reliance on the *Bayly* case, reversed a decision of the Seventh Circuit, 65 F.2d 632, arising in Illinois.⁶

⁶In the *Bosworth* case, the forwarding bank had even given an immediate credit to its depositor. The Supreme Court nevertheless held it to be an agent only. In the present case, defendant had given no credit at all to "Lofendo."

In Order to Prevail Defendant Must Not Only Have a Standing but It Must Have a Better Right in the Checks Than United Produce Since the Latter Has No Rights at All.

In the cases just discussed the collecting bank had actually collected the funds, and there was no fraud perpetrated on it by anyone. Consequently, it was accountable to *someone*. But that someone, it was held, was not the forwarding bank, but the payee. And so defendant is without standing to assert that the checks were collected.

But even if it had a standing, it could prevail only if its rights were better than those of "Lofendo", because "Lofendo" is United Produce (p. 4, *supra*), and patently United Produce has no rights at all against plaintiff.

A. WHERE PAYEE AND MAKER ARE THE SAME, IT CAN ACQUIRE NO RIGHTS AGAINST THE DRAWEE BANK AS A RESULT OF A CHECK DRAWN AGAINST INSUFFICIENT FUNDS OR AS PART OF A FRAUD.

If the owner of a check is party to the fraud on the drawee bank or knew that the drawer had insufficient funds, he can assert no claim that the check has been paid. We know of no decision contrary to this common-sense rule.

A bank paying a check, drawn on it, to a bona fide holder in the mistaken belief that there were sufficient funds in the account may not recover the payment. Many of defendant's citations hold no more than this.⁷ Yet, as pointed out in 9 C.J.S. 724, 725,

"the bank may recover where the holder is not a purchaser for value * * * or where the holder has fraudulently induced the bank to pay * * *."

⁷E.g., *First National Bank v. Noble*, 179 Ore. 26, 168 Pac.2d 354. There the court held that under the custom of the community giving a cashier's check was equivalent to giving cash (168 Pac.2d 359 (2d col.) 360, 361), and applied the rule that a holder of a check who has paid value in good faith and receives payment from the drawee is under no duty to return the money.

"Where a bank honors and pays a check under a mistake of fact, it may sue for recovery of the money against one receiving payment thereon who is not a bona fide holder for value * * *. If the payee of a check has knowledge that there are no funds on deposit to meet it, and the bank pays the check in ignorance of that fact, there may be a recovery of the payment, or in case a credit has been given the payee on the books of the bank it may be stricken off. * * *

* * * * *

"Where an improper payment of a check is induced by the holder's fraud or misrepresentation, the bank may recover the amount paid, although the bank's action was negligent as to the drawer."

Similarly, it has been held in "across-the-counter" cases, i.e., cases where one presents a check across the counter to the drawee and instead of taking the cash accepts a credit in his own account at the same bank, that the bank may not cancel the credit merely because the drawer's account had insufficient funds, for the case is similar to receiving the cash and redepositing it.

But even in these cases, as said in *Brady on Bank Checks* (2d ed.), p. 423,

"The holder, however, must act in good faith in order to be entitled to retain the benefit which the law accords him upon depositing a check to his credit in the drawee bank. * * * where the holder of a check deposited it in the drawee bank, knowing that the drawer had no funds there to meet it, the crediting of the check to the holder did not constitute a payment of the check and the depositor could not recover the amount from the bank."

As 9 *C.J.S.*, p. 503, says:

"* * * but if the holder of the check knows that there are not sufficient funds he is guilty of a fraud on the bank, and the collection may be cancelled."

Where the holder of the check and the drawer (maker) are one and the same, the case is even clearer. As 7 *Zollman on Banks and Banking*, p. 444, says:

"Much less can it be doubted that a recovery lies where the check has actually been paid to the drawer. The money of the bank can in such case be traced into the hands of the drawer, and neither law nor equity demands that the latter should be allowed to retain what he has wrongfully obtained."⁸

Defendant's own citations recognize the fact. Thus, in *Oregon Iron & Steel Co. v. Kelso State Bank*, 129 Wash. 109, 224 Pac. 569, a bank was denied recovery against an innocent payee where it paid against insufficient funds, but the court said that it could recover from the drawer (p. 573). Here payee and drawer were one. Defendant cites a number of other authorities to support its contention that the mere bookkeeping entries in Chicago constituted payment. *But all of them recognize that fraud of the payee would strip such bookkeeping acts of any capability of constituting payment* (see discussion at pages 95-98, *infra*). For example, *Restatement of Restitution*, Sec. 14, Illustration 8, states that the paying bank may recover where the payee knew that there were insufficient funds behind the check.

Answer to Defendant's Statutory Argument.

The common sense principles just reviewed eliminate an argument that defendant bases on Section 207(a) of the Illinois Negotiable Instruments Act, as it read in 1948. The section is quoted in its brief, page 18, footnote 8.⁹

⁸Zollman also says (447):

"Where money is fraudulently obtained from a bank on an overdraft, the title thereto remains in the bank, and it may be followed and reclaimed in the hands of any person who has not taken it in good faith and allowed an equivalent therefor; and therefore, where the identical money is deposited in another bank, the defrauded bank may have an injunction restraining the withdrawal of the same."

⁹That section was completely changed in 1949; Laws 1949, p. 1160, Sec. 1.

Defendant asserts that, if a check is not rejected within a specified time, "the check is then deemed to have been paid", under this statute. The section does not so provide. Its meaning is clear when read in context.

Title III (Sections 184 to 189) of the Uniform Negotiable Instruments Law (N.I.L.) deals with "promissory notes and checks." This title constitutes Sections 3265 to 3265(g) of the California Civil Code and Sections 205 to 211 of the Illinois law.¹⁰ Section 207(a) of the Illinois Act was inserted by amendment in 1943 into the Illinois equivalent of Title III.

The last section of the title (Section 189, N.I.L.)¹¹ provides:

"A check of itself does not operate as an assignment of any part of the funds to the credit of the drawer of the bank, and the bank is not liable to the holder unless and until it accepts or certifies the check."

Prior to the enactment of the N.I.L., most jurisdictions, including California, held that the payee or holder of a check had no rights whatever against the drawee bank, in the absence of an acceptance. The drawee's duties were to the drawer only, and a check was not an assignment of funds. 9 C.J.S. 783. *Dunlap v. Commercial National Bank*, 50 Cal. App. 476, 480, 195 Pac. 688. In these jurisdictions Section 189 was merely declaratory of what was already the law. In a few jurisdictions, such as Illinois, a check was deemed an assignment of the funds, and the payee had the rights of an assignee. In these jurisdictions Section 189 changed the law. *State Bank of Chicago v. Mid-City Bank*, 217 Ill. App. 81; *Independent etc. Assn. v. Fort Dearborn Bank*, 142 N.E. 458, 311 Ill. 278.

The later adoption in Illinois of Section 207(a) was merely a partial restoration of the former rule in that state; that is, if the bank fails to reject a check within the specified time, the lapse of time operates as an acceptance and thus as an assignment from

¹⁰Smith-Hurd Ann. St., Ch. 98.

¹¹Ill. Act, Smith-Hurd, Ch. 98, Sec. 210; Cal. Civ. Code, Sec. 3265(e).

the drawer to the payee or holder of the drawer's rights as creditor against his bank.

But an assignee has no better rights than an assignor. 6 *C.J.S.* 1155, Sec. 99; *Restatement of Contracts*, Sec. 167.¹²

Where a check is accepted by mistake, the acceptance may be revoked, so long as rights of third parties have not intervened and the holder has not changed his position in reliance thereon. This is true in California, *Steinhart v. National Bank*, 94 Cal. 362, 29 Pac. 717, and Illinois. Thus in *Gillett v. Williamsville State Bank*, 34 N.E.2d 552, 310 Ill. App. 395, one of defendant's citations, the court noted (p. 555, 2d col.), "Where a check has been certified by mistake and the rights of third parties have not intervened, the certification may be revoked."

Most other jurisdictions agree. 9 *C.J.S.* p. 793; 5 *R.C.L.* 527.¹³ And all agree that this is so where the acceptance was procured by fraud; and where the acceptance is revocable, the facts making it so are a defense to a suit by the holder against the bank. 9 *C.J.S.* 785, Sec. 367; p. 793, Sec. 376(b).

In short, lapse of time under Section 207(a) would merely create an obligation on the part of the drawee bank to the payee to the same extent as the bank was obliged to the maker to honor his check. It cuts off no defenses against the payee that the bank would have against the drawer if suit were brought by the drawer for dishonor of his check. This is indicated by the only case involving the section, *Rock Finance Co. v. Central Nat. Bank of Sterling*, 89 N.E.2d 828, 336 Ill. App. 319 (1950). A summary judgment had been correctly entered for the drawee in a suit on a check because it was rejected within the prescribed time limit,

¹²*Restatement of Restitution*, Sec. 172, p. 693, says:
 " * * * although an assignee who purchases the assignment for value without notice of equities of third persons takes free of such equities, he takes subject to such defenses as the obligor may have (see *Restatement of Contracts*, Sec. 167)."

¹³*Irving Bank v. Wetherald*, 36 N.Y. 335; *Carnegie Trust Co. v. First National Bank*, 141 N.Y.S. 745; *Mt. Morris Bank v. Twenty-Third Ward Bank*, 64 N.E. 810 (N.Y.).

provided that the bank had until the end of the day and not merely until the close of the bank at 3 P.M. The court stated (p. 830) that the question was whether failure to reject before 3 P.M. "constituted an implied acceptance of liability thereon." If it did, "the issue of defendant's liability would depend upon other affirmative defenses involving certain questions of fact."

Parties may by contract superimpose upon a statute which makes delay equivalent to acceptance a provision that the acceptance may not be revoked or may be revoked within a limited time (see, e.g., discussion of cash letters at p. 14, *supra*, and pp. 87 et seq., *infra*). But nothing like that was present in this case as respects the 6 checks for \$113,216.50 or the 4 checks for \$89,813.10.

Two conclusions are evident:

1. Since "Lofendo", the payee, and United Produce, the maker, were identical, every defense plaintiff had against United as maker it had against United as payee, despite "acceptance". *Under the facts of this case*, Section 207(a) gave the payee no rights.

2. That section has no relevance to the rights of defendant. It was not the payee, nor was it a holder in due course (see discussion, pp. 36, 37, *supra*).

B. "LOFENDO," i.e., UNITED PRODUCE, HAS NEVER HAD ANY RIGHTS AGAINST PLAINTIFF ARISING OUT OF THE CHECKS.

Since the payee, "Lofendo", is United Produce, it could never maintain a suit against plaintiff to compel it to pay \$113,216.50 or \$89,813.10 on the basis that the Chicago bookkeeping entries were payment. That would amount to United Produce coming into court and saying:

"We have drawn a check on you, Merchandise Bank, payable to ourselves. True, we have no funds with you to pay it. True, we are already indebted to you for a half million dollars because we have been criminally swindling you. True, the supposed balance to our credit on the commercial

ledger was fictitious and fraudulent. But you made some marks with a pen on your books and so you must now pay us another \$113,216.50 and another \$89,813.10 so as to increase the swindle and fraud by that amount.”

Such a suit would be sheer lunacy.

Defendant argues (Br. pp. 22, et seq.) that plaintiff was bound to pay the 6 checks and the 4 checks because when they arrived at plaintiff's office a credit balance *appeared* on the face of United Produce's commercial ledger sheet. Defendant does not deny that United Produce had defrauded plaintiff. It admits that the apparent credit was the result of loan transactions procured by fraud. But it argues that the fraud exhausted itself in inducing plaintiff to make loans (e.g., Br. 121). And it insists that the plaintiff was under the duty to pay out cash even after it discovered the fraud.

The precise argument was rejected in *Steinhart v. National Bank*, 94 Cal. 362, 29 Pac. 717. United's commercial ledger sheet merely recorded the still inchoate results of United's fraud.¹⁴ When plaintiff's clerk sent out the advices of credit and made the various bookkeeping entries, he did so in the mistaken belief that the ledger sheet recorded actual, available funds instead of the product of a swindle. In the *Steinhart* case, Politz gave plaintiff a promissory note. Plaintiff delivered it to a San Francisco bank for collection, which forwarded it to the defendant bank, where the maker had a general account. A clerk presented it to the maker, who wrote on it, "Please charge the same to my account." The clerk then wrote on the back of the note "charged account" and placed on it the usual stamp to indicate that it was cancelled that day. He then charged the amount of the note in the maker's passbook as well as on the ledger sheet of the maker's

¹⁴In passing a credit to United's commercial ledger sheet, plaintiff was merely announcing to the customer, United, a willingness to lend to it by honoring checks up to a certain amount. It did not thereby become indebted to United. The loan to United was inchoate. Plaintiff did not have to go through with it when it discovered that it was induced by fraud.

account, drew a check in favor of the San Francisco bank in payment of the note, and mailed it with a letter of advice.

At that time the maker had insufficient funds on deposit with the defendant to pay the note. But, shortly before, he had given a note to the defendant to cover overdrafts, and this was credited to his account and created a sufficient balance to cover the check.

But after the close of business hours, the maker made a general assignment for creditors. Learning that fact, defendant procured from the post office the envelope containing the check, cancelled it, endorsed on the back of the note which it had received for collection the notations "charged in error" and "cancelled in error," and returned it to the San Francisco bank.

Neither plaintiff (the payee) nor the San Francisco bank had any notice of the transactions between defendant and Politz until after the check had been cancelled. The payee sued defendant bank, and defendant had judgment. The question was "Did the transaction between Politz and the defendant constitute a payment of the note?" The court held no (pp. 366, 367):

"It is not disputed that when the note was presented to Politz for payment, and he wrote on it, 'Please charge the same to my account,' he had no money in the bank to his credit, but was indebted to it in a considerable sum. The request was, therefore, in effect, that the defendant advance or loan to him the money to make the payment, and trust him till he could pay it back. This the defendant, supposing him at the time to be of good credit, seems to have been willing to do, but when, near the close of the business day, it learned that he had made an assignment for the benefit of his creditors and was insolvent, it changed its mind, and concluded not to advance the money. It thereupon got back its check and canceled it.

"At this time the transaction was unknown to the plaintiffs and was incomplete, and as against Politz, the defendant had a clear right, we think, to do as it did.

"And if it be assumed, as claimed by appellants, that the transaction amounted to a contract on the part of defendant to advance the money to pay the note, still, it had a right

to rescind the contract if its consent thereto was given by mistake (Civ. Code, sec. 1689), and that it was so given is shown by the evidence and findings."

While United Produce's commercial ledger sheet on plaintiff's books had a credit figure, *that sheet was not* United's account with plaintiff. As Mr. Messenger, an expert as to the significance of plaintiff's records, testified, United had but *one* account with plaintiff; this was reflected and recorded in four ledgers and supporting documents, the true balance of the account could be ascertained only by consulting all the papers together (R. 236-238), and so consulted, there was no credit balance. This testimony supports the trial court's finding X (R. 100):

"That on November 12, 1948, and on November 15, 1948, as a result of the foregoing frauds perpetrated by United Produce Company on plaintiff, there was an apparent credit balance on the face of United Produce Company's account with plaintiff, *but in fact there was no actual credit balance* on November 12th or at any time thereafter and instead there was an overdraft of over \$500,000."

Mr. Messenger's testimony is self-evidently correct. Any review of United's several ledger sheets on plaintiff's books demonstrates their inextricable connection with each other. We make such a review but relegate it to an Appendix, since the finding is already amply supported.

Moreover, regardless of whether United Produce had one or several accounts with plaintiff, the relationship was such that plaintiff was under no obligation to United to honor its checks. As the trial court found (Finding VIII, R. 99):

"United Produce Company's account with plaintiff was maintained under several writings which together constituted an agreement defining the terms of the relationship between United Produce Company and plaintiff; that under that agreement checks received by plaintiff from United Produce Company drawn on the 'Lofendo account' and represented

to be remittances from 'Lofendo' were received for collection only, and conditional credits in the amount of the checks were entered in the United Produce Company account with plaintiff subject to charge-back at any time before actual collection of the funds."

And it was agreed that whenever plaintiff deemed checks, endorsed and remitted by United Produce and still uncollected, to be inadequate security, it could apply any credit balance against any sums due to the plaintiff. Thus plaintiff had a right at any time, either before or after the maturity of any debt due it, to apply the balance against the debt no matter how arising.¹⁵

Defendant is forced to admit that plaintiff had a right of offset against United's apparent credit balance (Br. 26). But, it argues that an offset was not exercised until after the 6 checks and 4 checks arrived. The argument is footless. The time of offset could become material where the superior rights of others were involved, but not as between the bank and its own customer. Patently, United could not sue plaintiff and recover the amount of the apparent credit balance despite the fact that it had defrauded the plaintiff out of over \$500,000 and owed it more than that sum, merely because it had demanded that balance before the right of offset was exercised. The offset would be effected in the litigation.

And since "Lofendo" was United Produce, neither could "Lofendo" recover from the plaintiff.

And neither can defendant unless by some legerdmain it can establish a "better right" than United Produce. This, as we now show, it cannot do.

¹⁵Since defendant confines its discussion of this subject largely to an appendix, we relegate to an Appendix to this brief presentation of the provisions of the agreement.

III.

**Defendant Has No Better Right Than United Produce,
Which Has None**

The only way defendant could acquire any rights whatever in the checks was through "Lofendo". Piercing through the fog of words, the essence of its case is a claim that somehow, some way, it secured through the defrauder "Lofendo", i.e., United Produce, rights against the plaintiff *better than United Produce itself would have* to compel payment of the 6 checks and the 4 checks or to insist that plaintiff become obligated to pay their amount.

There are but two ways whereby one can obtain a greater right in checks than the payee: (1) by becoming a holder in due course, i.e., acquiring for value before notice, or (2) by operation of estoppel. *Here neither situation is present.*

We have seen that defendant was not only not a holder in due course, *it was not a holder at all* (pp. 36, 37, supra). Defendant so admits (Br. 29).

We have also seen that there was no estoppel, because defendant never paid any money or changed its position in reliance on the checks or on an assumption that they were paid, collected or good. The trial court so found (pp. 10, 12, 19, supra), and it therefore concluded:

"That in connection with the collection of the checks, defendant, not having acted in reliance on any act or omission of plaintiff, could not have any greater rights than its principal 'Lofendo' " (Conclusion IX, R. 115).

Defendant does not attempt to answer this analysis. But it tenders two arguments by which it hopes, in a different way, to show a better right than "Lofendo".

1. An argument having something to do with an alleged "lien" on the 6 checks for \$113,216.50 and the 4 checks for \$89,813.10 (Br. 45, et seq.).

2. An argument covering plaintiff's internal bookkeeping entries in Chicago.

Each of these arguments disregards the facts of this case.

A. DEFENDANT HAS NO BETTER RIGHT THAN UNITED PRODUCE ON A THEORY THAT IT HAD A LIEN ON THE CHECKS.

Defendant (Br. 50) invokes Cal. Civ. Code, Sec. 3108, which provides that one is a holder for value of a negotiable instrument if he has a lien on it.

The short answer is that defendant had no lien on these checks. After considerable discussion, *defendant so admits* (Br. p. 49). Consequently, we shall cover the subject summarily.

A banker's lien is a possessory lien on tangible property, such as securities or paper held by the bank, to secure a debt due from the owner. Cal. Civil Code, Sec. 3054¹⁶ codifies the law and leaves no doubt that in order for there to be a lien there must be three elements, (a) a debt must be present to be secured, (b) the lien is dependent on possession of the instrument, and (c) there must be tangible instruments or property to which the lien attaches. The lien has nothing to do with mere offset of debts (*Gonsalves v. Bank of America*, 16 Cal.2d 169, 105 Pac.2d 118).¹⁷

It goes without saying that a "possessory" lien expires when possession is parted with.¹⁸

Here defendant came into possession of the 4 checks on November 10th and the 6 checks on November 13th, *and it parted*

¹⁶Civil Code, Sec. 3054 provides:

"A banker has a general lien, dependent on possession, upon all property in his hands belonging to a customer, for the balance due to him from such customer in the course of the business."

¹⁷The *Gonsalves* case and 9 C.J.S. 614, 615, show that the use of the term "banker's lien" to refer to a right to offset a debt due from bank to customer against a debt due from customer to bank is improper. This right is not peculiar to banks but exists as between all creditors and debtors. It is not a lien at all.

¹⁸The banker's lien of the California Civil Code is no greater than the banker's lien of the law merchant. *Goggin v. Bank of America*, 183 F.2d 322 (9 Cir.); *Berry v. Bakersfield*, 177 Cal. 206, 170 Pac. 415. The banker's lien of the law merchant is a "possessory lien which means only that it [the bank] had a right to hold and retain possession." *In Re Cummins Constr. Corp.*, 72 F. Supp. 409, aff'd, 164 F.2d 983, cer. den. 333 U.S. 881.

with possession on the day of receipt, for it sent them to the plaintiff immediately. Since plaintiff was not defendant's agent for collection but Lofendo's, plaintiff's possession was not defendant's (see pp. 37, 38, *supra*).

Neither on November 10th or 13th was "Lofendo" indebted to defendant at all, for the account then had a clear collected balance (R. 1181, 1259).

Nor did "Lofendo" become indebted to defendant until November 16th, for after November 10th no checks were honored against the account until that day (R. 1181). Nor did defendant ever give "Lofendo" credit on any of the 6 checks or 4 checks or ever allow him to draw against them.

It follows that defendant never acquired a lien on the checks. There was no debt to it from him at any time while it had possession. And there was no possession when the debt arose or afterwards.¹⁹ Instead, when finally a debt arose, it was too late for defendant to become a holder in due course. One cannot become such after a check reaches the hands of the drawee bank and is presented for payment.²⁰ Either it is then paid or it becomes overdue, since a check is payable on presentation.²¹ If the former, it ceases to exist.²² If the latter, it is too late for anyone to become a holder in due course.²³

¹⁹Moreover, N.I.L. Sec. 191 (Cal. Civ. Code, Sec. 3266, Ill. Act, Smith-Hurd Ann. St., Ch. 98, Sec. 213) defines a "holder" as a "payee or endorsee of a bill or note, who is in possession of it."

²⁰Unless they are "accepted," redelivered under N.I.L., Sec. 191, Smith-Hurd, Ch. 98, Sec. 213, and put into circulation again as live paper.

²¹N.I.L. Sec. 185; Cal. Civ. Code, Sec. 3265 (a); Ill. Act, Smith-Hurd Ann. St., Ch. 98, Sec. 206.

²²10 *C.J.S.*, Sec. 448(c), p. 984; *South Boston Co. v. Levin*, 143 N.E. 816 (Mass.) (N.I.L. Sec. 119; Cal. Civ. Code, Sec. 3200; Ill. Act, Smith-Hurd, Ch. 98, Sec. 140).

²³N.I.L. Sec. 52(2); Cal. Civ. Code, Sec. 3133(2); Ill. Act, Smith-Hurd, Ch. 98, Sec. 72(2).

Now defendant admits all this. It admits that "Lofendo" was not indebted to it until November 16th. It admits that there can be no lien without a debt, that there was no debt while defendant had possession, and that therefore "*Bank of America never did have a lien on the checks themselves*" (Br. 49).

Therefore defendant could not have become a holder in due course under Cal. Civ. Code, Sec. 3108, which pertains to a "lien on the instrument".

In view of the above concession, it is difficult to see the pertinence of defendant's argument about liens or the pertinence of its citation of *Kane v. First National Bank*, 56 F.2d 534 (5 Cir.) or *Goggin v. Bank of America*, 183 F.2d 322 (9 Cir.). The *Kane* case holds that, when a bank takes paper and sends it to another bank for collection, its lien continues and attaches to the proceeds. But this applies only to a situation where a lien has attached to the paper in the first place, i.e., where there was a debt in existence, on the basis of which a lien could arise. Where, as here, there was no debt while there was possession, no lien has arisen, and what has never come into existence cannot continue.

The *Goggin* case is similar to *Kane*. It has been a debated question whether a pre-existing debt or an advance not made on the faith of the paper is sufficient to permit a lien to attach to a particular instrument or whether new advances must be made "on the faith of the paper". The *Goggin* case held that a lien would attach if there was any debt. It did not dispense either with the necessity of a debt or of concurrent possession of the instrument.²⁴

Defendant's discussion of a "lien" then veers off into something quite different (pp. 50-53). It speaks of a "lien" on "pro-

²⁴In footnote 4, 183 F.2d at 326, the *Goggin* opinion cites another case and says, "No banker's lien was asserted for the good reason that no indebtedness was owing to the bank."

Neither the *Kane* nor *Goggin* case involved the rights of third parties, but arose between the depositor's trustee in bankruptcy and the bank. In the *Goggin* case the court remarks (p. 326, fn. 2d col.), "Our case does not concern a controversy between correspondent banks."

ceeds", loose usage for a claim of a right of set-off. It asserts that it became "a bona fide holder for value of a right of set-off". We have difficulty understanding what defendant means. The trial court *found* that defendant paid no value prior to notice and that nothing was ever paid in reliance on the checks or in a belief that they were collected (pp. 10, 12, 17, *supra*). These findings are not questioned.

As between defendant and "Lofendo", defendant may have had a right to set off any debt which it owed to him against any sums that he owed to it. But here the question does not concern the rights of defendant and "Lofendo" *inter se*. The question is whether plaintiff owes any sum to defendant. We have seen that plaintiff owed none to "Lofendo". Defendant's claim against plaintiff could only arise through "Lofendo". And so we return to the question: Did defendant acquire through the defrauder, "Lofendo", greater rights against plaintiff than "Lofendo" had? Until and unless that is answerable in the affirmative, defendant has no "proceeds" to which it can apply a right of offset as between itself and its customer, "Lofendo".

B. DEFENDANT HAS NO BETTER RIGHT THAN UNITED PRODUCE ON ANY THEORY THAT THE AGENCY RELATIONSHIPS BECAME AUTOMATICALLY TRANSMUTED INTO DEBTOR-CREDITOR RELATIONSHIPS BY REASON OF THE INTERNAL BOOKKEEPING IN CHICAGO.

Defendant's next contention is that plaintiff's act of perforating the 4 checks on November 12th and the 6 checks on November 15th, and its internal bookkeeping at the time, transmuted the relationships of the parties:—that plaintiff automatically ceased to be "Lofendo's" agent for collection and became defendant's debtor, and concurrently defendant ceased to be "Lofendo's" agent and became his debtor! and this, although defendant did not know about what happened in Chicago until informed that it was the result of mistake and fraud. Then, the argument continues, when defendant honored checks drawn on the "Lofendo" account on November 16th, it became "Lofendo's" creditor. And

in this way defendant became a bona fide purchaser "of a right of set-off", although it knew nothing about either credit or debit for several days yet to come.

The premise of this tour-de-force is that the checks were "paid" or "collected" and that the relationship of the parties changed on November 12th and 15th. The premise has no shred of substance, as we show at pp. 79-99.

But assuming the premise, the conclusion still fails: defendant would still not have better rights against plaintiff than "Lofendo" had.

1. The Defendant's Argument Fails for Lack of Consideration for any Obligation of Plaintiff to Defendant.

To say that the relationship of debtor-creditor arose between plaintiff and defendant is merely another way of saying that a contract arose whereby plaintiff promised to pay to defendant. As the court points out in *Guardian National Bank v. Huntington County State Bank*, 187 N.E. 388, 206 Ind. 185 (at p. 389, 2d col.), if any effect is to be given in a case of check collection to mere entries on the collecting bank's books, it must be on the ground that the entries constitute an executory contract to pay. This is common sense.

There would have to be consideration to support such a contract. And such a contract fails where the consideration fails or becomes void for any cause. *Cal. Civ. Code*, Sec. 1689, subd. 3 and 4. And cf. *National Bank of California v. Miner*, 167 Cal. 532, 535, 140 Pac. 27.

Defendant nowhere tries to state what the consideration was. Clearly, *if* there was any, it could be nothing else than defendant's assumption of plaintiff's obligation to the payee of the checks. *If* plaintiff had collected the checks, then as the payee's collecting agent it had become obliged to remit to the payee, and the alleged change of relationship would merely be a contract whereby defendant agreed to assume plaintiff's obligation to the payee in consideration of plaintiff's agreeing to pay defendant—in short,

an agreement whereby plaintiff indemnified defendant for that assumption.

But because of the facts of this case, which differentiate it from any cited by defendant, plaintiff had no obligation at all to the payee, for the payee, "Lofendo" was United Produce (see p. 4, supra).

Defendant thus became subject to no obligation and gave no consideration to plaintiff for any promise to pay *to it* the amount of the checks.

Interpleader

Should "Lofendo"-United Produce claim to be entitled to recover the amount of the checks from defendant, the defendant could not for that reason charge plaintiff's account. It could interplead "Lofendo"-United Produce and the plaintiff and step aside immune, just as it has done with \$30,000, the balance remaining after it seized the \$113,216.50 and used enough of that sum to replenish losses unconnected with the 6 checks or the 4 checks (cf. Br. 1).

Defendant's Contract with "Lofendo" Precluded any Obligation to Him.

The same conclusion follows by observing the facts from the aspect of the contractual arrangement between "Lofendo" and defendant whereby defendant undertook to collect the checks as "Lofendo's" agent.

Under that contract defendant could not become liable to Lofendo merely upon book entries in plaintiff's books. By the signature card governing the "Lofendo" account, the depositor agreed to be bound by defendant's rules and regulations (R. 93). These provided that "payments for outgoing collections must be final and in good funds" and that "returns must be final and in good funds" (R. 1181, 1189, 1192). Under this contract, no customer placing a check with defendant for collection could contend that it became liable to him until it actually got the funds in hand. *O'Neil v. First National Bank of Lovelock*, 15 F. Supp. 133, considers the meaning of the quoted words and shows that

there is no "final payment" "in good funds" from the standpoint of forwarding bank and its depositor, merely because bookkeeping entries occur in the bank to which the check has been forwarded.

And the same appears from *Dakin v. Bayly*, 290 U. S. 143.

The meaning of the contract between Lofendo and the defendant is fortified by the California Bank Act. In the absence of contract or statute, a bank may accept only cash in payment of a collection. *Luckehe v. First National Bank*, 193 Cal. 184, 187, 223 Pac. 547. The language of the contractual arrangement here as well as in the *O'Neil* case is similar to the language of Section 16(c) of the California Bank Act. That section, as amended in 1943, provided that a bank may send a check for collection "directly to the bank on or by which it is drawn", and

"in payment thereof there may be accepted either money or the check or draft of the bank on or by which it is drawn, or at or through which it is made payable, or the check or draft of any bank to or through which it has been forwarded for collection, or credit therefor may be accepted with any Federal reserve bank, or with any bank designated as a depository by the bank allowing such credit" (Cal. Stats. 1943, Ch. 930, p. 2803).

This section protected the forwarding bank from becoming liable to its depositor before it had actual funds available. Correlatively, it protected the depositor from losing his rights by reason of an acceptance by the forwarding bank of something less. Under it defendant could accept as collection only (a) actual money, (b) check or draft, (c) credit on the books of a federal reserve bank, or (d) credit on the books of any bank designated by Merchandise as a depository.²⁵

²⁵Contrast *Dean Tobacco Warehouse Co. v. American National Bank*, 123 Tenn. 365, 117 S.W.2d 746, cited by defendant. There the customer's deposit ticket authorized the forwarding bank to send the check to any bank and to "accept its draft or credit or conditional payment in lieu of cash."

A credit on Merchandise's own books is not recognized by the statute, since plaintiff could not be its own depository, nor was it defendant's depository. As defendant says (Br. 37), "Bank of America did not keep money on deposit with Merchandise", but "Merchandise had sums on deposit with Bank of America" (Br. 36). If, as and when debits were made, on plaintiff's instructions, against its deposit on defendant's books in San Francisco, defendant would have actual funds. Otherwise not (Finding IV, R. 96, and see discussion, pp. 12-16, *supra*).

Until then Lofendo could have no legally enforceable claim against defendant. As said in *Dakin v. Bayly*, *supra*.

"The bank [forwarding bank, here defendant] was not bound to assume the relation of debtor until, in the words of the statute, it had received final payment, i.e., cash or its equivalent, and we should not presume that it had done so." (290 U. S. at 149)

Until Lofendo had an enforceable claim against defendant, defendant could have none against plaintiff. And that event never occurred.

Trial Court's Conclusion.

The trial court concluded:

"That defendant did not become a debtor of Lofendo in connection with the 6 checks totalling \$113,216.50 or the 4 checks totalling \$89,813.10" (Conclusion VI, R. 114).

2. Defendant's Argument Is Also Destroyed by the Agreement of November 17th and 18th, 1948, as Found by the Trial Court.

On November 17th and 18th, defendant agreed with plaintiff not to act on the advice of credit when received, to return it, and not to charge plaintiff's account. (So found, see pp. 7, 8, *supra*.)

We deny that the events of November 15th in Chicago created a contract between plaintiff and defendant whereby defendant assumed plaintiff's obligations to "Lofendo" in consideration of plaintiff's agreement to pay defendant. But if it did, then the agreement of November 17th and 18th was binding as a contract

of mutual rescission of the reciprocal obligations of the contract of November 15th.

Defendant admits that this is the necessary effect of the trial court's finding (Br. p. 10).²⁶ But it seeks to escape the consequences by assailing the agreement. Although it discusses the evidence at some length (Br. 108-117), it concedes that the trial court acted within its province in believing the testimony of plaintiff's witnesses and disbelieving defendant's version (Br. 10, 111). And its own quotations from the record support the finding.²⁷

Wherever from facts found other facts are inferable which will support a judgment, it is the duty of the appellate court to draw the inference. *Triangle Conduit etc. Co. v. F. T. C.*, 168 F.2d 175, aff'd, 336 U.S. 956. Consequently, the finding that there was an agreement finds against defendant on all facts on which its argument rests. To answer defendant we need go no further than to show that the evidence supports the finding.

The Agreement of November 17th and 18th Did Not Lack Consideration.

First defendant contends (Br. 117) that the agreement of November 17th and 18th was not supported by consideration. The simple answer is that if obligations arose on November 15th, as defendant claims, the mutual release of those obligations was consideration, each for the other. *Sistrom v. Anderson*, 51

²⁶Defendant states (Br. 10): "In other words, the trial court found in substance that an agreement was made between Merchandise and Bank of America under which Bank of America agreed in effect that Merchandise's payment of the six checks should be rescinded and that Bank of America would repay the amount thereof to Merchandise and would surrender whatever liens or other rights it might have with respect to the six checks and their proceeds." The court did not find that the checks had been paid or that defendant had acquired liens. But if they had been paid or liens acquired, there is no doubt that the agreement found by the court worked a rescission.

²⁷In addition, we note that defendant's officer Estribou testified that he knew on November 18th that his bank had made a "commitment * * * with regard to that rescission" (R. 359). We also note that defendant wrote to its branch: "We must recognize their [plaintiff's] instructions" (R. 1174-A).

C.A.2d 213 at 219, 124 Pac.2d 372. And as said in that case, "the fact that [one of the parties] did not in reality wish to be relieved does not alter the fact that there was a consideration" (p. 219).

"Lofendo's" consent to this rescission was unnecessary. It would have been unnecessary even had he not been party to the fraud. The rescission would leave him with his claim against plaintiff (for whatever it was worth). The only theory on which he could ask that the consequences, if any, of the Chicago book entries be maintained would be that they constituted a contract for his benefit. But under *California Civil Code*, Sec. 1559, such a contract may be rescinded by the parties to it without the consent of the third person at any time before he seeks to enforce it.

The Agreement of November 17th and 18 Was Not Voidable for Mistake.

Next, defendant argues (Br. 118) that its agreement of November 17th and 18th was not binding because based on "mistake," i.e., its belief that it was in the clear in the "Lofendo" account.

The contention collapses on its facts, because it is inferable, from the finding that there was an agreement, that it was an agreement in a legal sense, i.e., one having legal consequences; the finding therefore carries with it a finding that there was no mistake, and the evidence unquestionably supports that finding.

While defendant's officers were under the impression that it had not paid out against uncollected funds, this impression was not based on anything said by plaintiff, and defendant's officers testified that they had in mind the possibility that their impression might not be correct, because there were so many items in transit that anything could happen (R. 549, 558, 559). Thus the possibility that the branch might not be in the clear was in the minds of the parties. Yet defendant's head office gave an absolute command to its branch to honor plaintiff's instructions (see P. Ex. 11, R. 1174A). Its counsel testified that when he told

its vice president to write the branch manager "giving him instructions to ignore the advice of credit when it arrived, [he] did not tell [him] to put in any clauses saying if, or provided the Bank of America is not hurt." And "when [he] saw the letter which was later shown to [him] * * * before it was sent out," he observed "that it had no such ifs or buts in it," but he "approved the letter anyway" (R. 701, 702).

One cannot claim mistake because a particular fact proves not to be so, if at the time he made the contract he was conscious of the imperfection of his knowledge or uncertain or doubtful, 48 C.J. 763, 70 C.J.S. 369, or aware of the possibility that the fact might not be so, *Cleveland-Cliffs Iron Co. v. East Itasca Mining Co.*, 146 Fed. 232 at 237, 238; *McGregor v. Millar*, 166 Kans. 657, 203 Pac.2d 137, 140, and authorities cited in these two cases. As stated in 3 *Corbin on Contracts* (1951), Sec. 598, p. 356, there is no mistake "where the risk of the existence of some factor * * * is consciously considered * * *; instead, there is awareness of the uncertainty * * *." (And see p. 358.)²⁸

²⁸Even if defendant had held an absolute belief that the "Lofendo" account was in the black, the fact would be irrelevant in point of law. In order for a mistake of fact to relieve against a contract, the fact must be "material to the contract," *Cal. Civ. Code*, Sec. 1577, 17 C.J.S. 497. "Collateral mistake" is not. 5 *Williston on Contracts* (Rev. ed.), Sec. 1569, p. 4380. The mistake must be as to a "basic fact," *Restatement of Restitution*, Sec. 11(3) and Sec. 9. To be material it must go to the essence of the contract, to one of the elements, i.e., the parties, the subject matter, the consideration, the consent, to one of its principal conditions and not merely to the inducement.

As said in *Cavanagh v. Tyson, Weare & Marshall Co.*, 116 N.E. 818 (Mass.), it must "relate[s] to a fact which is of the very essence of the contract * * * material in the sense that it is one of the things contracted about * * *." It must not be "collateral to the essential thing contracted about * * *."

The thing here contracted about was the 6 checks for \$113,216.50 drawn on plaintiff, not the "Lofendo" account generally and not *other* checks drawn on or deposited in that account.

The fact that defendant had already honored checks of "Lofendo" against uncollected funds is not material, because it is not related to the 6 checks for \$113,216.50. Defendant had not made payments in reliance upon or in connection with the 6 checks. Nor had it incurred the smallest liability by reason thereof.

**The Agreement of November 17th and 18th
Was Not Vitiating by Misrepresentation.**

Defendant finally assails the agreement by arguing that plaintiff misrepresented or suppressed material facts (Br. 121, 122). The argument has no legal substance, but it is sufficient to note that it rests on no facts.

The alleged misrepresentation is plaintiff's statement that the advice of credit had been sent out by error because the 6 checks had been charged against fictitious credits. But this statement is true. Defendant's argument is the very quibble we have answered at pp. 47-50, above.

The fact allegedly suppressed is that plaintiff "had by its negligence permitted the kite to continue" (Br. 122). Yet defendant's witnesses testified that plaintiff's officer, LeRoy, told defendant's officer, Duncan, that plaintiff had discovered a kite and informed him of the very occurrences which defendant now relies on as showing such negligence (R. 543, 547, 634).

Further on Significance of Agreement of November 17th and 18th.

In view of defendant's long attack on the agreement of November 17th and 18th, we may digress momentarily to note its place and significance in the case.

The plaintiff had the right to revoke and rescind its advices of credit, or "payments" made, or book entries, unilaterally, whether defendant agreed or not (see pp. 28, 29, 45, *supra*), and 65-73, *infra*). But in fact defendant did agree. That agreement is significant for several reasons: (a) The reason just discussed; if any change in relationship was worked by the book entries in Chicago on November 15th, which we deny, the agreement worked a rescission (pp. 59, 60, *supra*). (b) Additionally, and regardless of whether the agreement was a binding contract, its violation demonstrates defendant's bad faith (see p. 72, *infra*). And (c) it is practical construction by the parties of their collection arrangement and negatives the notion that any

change of relationship was effected at all by the Chicago book entries (see discussion at pp. 83, 84, *infra*).

3. Even if Defendant Assumed an Obligation to Lofendo, It Did Not Become a Holder in Due Course.

It may be added that even if defendant did become "Lofendo's" debtor on November 12th and 15th, which we deny, still it did not become a holder in due course. Under Section 54, N.I.L., one is not a holder in due course, even where he has agreed to pay for a negotiable instrument, if he receives notice before he pays anything upon his promise. This section is in effect both in California (Civil Code, Sec. 3135) and Illinois (Smith-Hurd Ann. St., Ch. 98, Sec. 74).²⁹ Both states hold that where a bank gives a customer credit on a check but receives notice of infirmity in his title before it pays out upon the credit, it is not a holder in due course. *National Bank v. Uptown State Bank*, 273 Ill. App. 401; *People's F. & T. Co. v. Matthews F. Co.*, 104 Cal. App. 630, 286 Pac. 710.

In *First State Bank and Trust Company v. First National Bank*, 145 N.E. 382, 314 Ill. 269, a check was presented by the alleged payee to the defendant, which credited him with \$500 in an account opened in his name and paid the remainder in cash. Plaintiff, the drawee bank, then paid the check. It developing that the check was a forgery, plaintiff demanded return of the money from the defendant. The deposit of \$500 credited by defendant to the purported payee had never been withdrawn.

Plaintiff recovered judgment for the \$500. The court said (p. 384):

"A bank is not a holder in due course of a negotiable instrument, if it has given nothing of value therefor beyond

²⁹This section provides:

"Where the transferee receives notice of any infirmity in the instrument or defect in the title of the person negotiating the same before he has paid the full amount agreed to be paid therefor, he will be deemed a holder in due course only to the extent of the amount theretofore paid by him."

a credit to the former holder as a depositor, and has not honored his checks upon or in any way bound itself to account to some one for the deposit. * * * A bank which has notice that a deposit is in reality the fund of another may refuse to honor the check of the depositor. * * * To the extent of \$500, appellant had not parted with anything of value on the check. When it was apprised of the defect in the title to the check, it could not then be held to be a holder of the instrument in due course to the extent of the sum not paid thereon. Negotiable Instruments Act, § 54. * * * If that sum is repaid by appellant to appellee, appellant will sustain no loss. By refusing to refund, it will increase its property at the appellee's expense."

Here, defendant never paid anything at all, and learned of "Lofendo's" fraud before it sought to act at all. "Lofendo's" title, i.e., United's title, was, of course, defective under the definition of N.I.L. Sec. 55 (*Cal. Civil Code*, Sec. 3136).³⁰

IV.

Plaintiff Had the Right to Revoke the Chicago Book Entries. If They Constituted "Payment," Plaintiff Would Be Entitled to Recover any Such Payment, Under *Weiner v. Roof*. Here Also Discussion of the Situation as to the Four Checks for \$89,813.10.

A. DISCUSSION OF THE RIGHT TO RECOVER GENERALLY.

Defendant's basic premise is that the Chicago bookkeeping entries were the equivalent, not only of "collection" and "payment," but of payment to defendant. But defendant's case can in no event be better than if plaintiff had delivered to defendant in San Francisco two bags of gold coin containing \$113,216.50 and \$89,813.10 and then sought their return by suit in a California court. The right to recover would unquestionably be gov-

³⁰One's title is defective when he obtained it "by fraud * * * or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith, or in such circumstances as amount to a fraud."

erned by California law. And so California law is determinative of all questions of rescission and revocation.

The California law is shown by four cases. *Weiner v. Roof*, 19 Cal.2d 748, 122 P.2d 896; *Steinhart v. National Bank*, 94 Cal. 362, 29 Pac. 717; *National Bank v. Miner*, 167 Cal. 532, 140 Pac. 27, and *Aebli v. Board of Education*, 62 C.A.2d 706, 724, 145 Pac.2d 601.

These cases establish that if plaintiff had delivered gold coin to defendant and if defendant was then advised that payment had been made because of mistake or fraud, *before* it paid over the cash to its principal or applied the cash on a debt due it from its principal or before it changed its position, it would be bound to return the funds.

One who pays money through fraud or mistake may recover it. As said in *Aebli v. Board of Education*, 62 C.A.2d 706, 724, 145 Pac.2d 601:

“* * * Mistake of fact, however, as a general rule furnishes a good ground for relief. Moreover, the mistake need not be mutual, or known to or shared by the party receiving the money. Money paid under a mistake of fact may be recovered back, however negligent the party paying may have been in making the mistake, unless the payment has caused such a change in the position of the other party that it would be unjust to require him to refund. (*National Bank of California v. Miner*, 167 Cal. 532 [140 P. 27].)”

Where payment has been made to another's agent in circumstances in which it could be recovered from the principal if paid directly to him, it can be recovered from the agent unless the latter has, before notice, paid it over to or for his principal. *Weiner v. Roof*, 19 Cal.2d 748 at 752 and at 755, 122 Pac.2d 896 (applying the rule to banks), and 1 *Mechem on Agency* (2d ed.) 1060 (applying it to transactions between forwarding and receiving banks in collections).

The discussion in *Weiner v. Roof* is full and complete. Prior to *Weiner v. Roof*, the California law was settled that

“one who has paid money through fraud or mistake to an innocent agent, may recover the amount from the agent, unless the latter has paid it to the principal, spent it on behalf of the principal, or paid it to a third party on behalf of the principal.”

and

“The fact that the agent credits the principal with the amount received does not release the agent from his obligation to make restitution so long as he continues to hold the money on behalf of the principal.”

Weiner v. Roof approved both of these statements (19 Cal.2d 748, 752). Before *Weiner* it was further held that application by the agent of the funds to a debt due to it from the principal, i.e., charging the principal's account, did not absolve the agent, even though the application had been made before notice, because the book entries could be reversed (*National Bank of California v. Miner*, 167 Cal. 532).

Weiner v. Roof modified that rule by holding that payment by the agent to itself in discharge of a debt to it from its principal is on the same footing as payment by the agent to anyone else at the principal's direction. But it applies the same standard: the application of the funds on the debt may not be made after it “has notice that the original owner of the money who paid it to the agent had a claim for restitution on the ground of fraud or mistake.”

Mechem points out that recovery may be had whether payment was made because induced by fraud of the principal alone, of the agent alone, or of both, and also where the payor “would concede that the principal had the right to receive it at the time it

was paid" but something "has since occurred that terminates the right of the principal to receive it" (1 Mechem, p. 1060).³¹

In *National Bank of Commerce of Kansas City v. American Exchange Bank of St. Louis*, 52 S.W. 265, 151 Mo. 320, the court said in a collection case (p. 268):

"* * * It seems, both upon principle and authority, that where money has been paid by one joint agent to another through mistake, and it has not been forwarded by the latter to the principal, or he has not done some act before notice of the mistake upon the assumption that the payment was good, by which he would suffer some damage if it should be held invalid, the agent so paying may recover back the money thus paid. * * * That this is the general rule there can be no question."³²

Since plaintiff and defendant were both agents of Lofendo for collection (see p. 37, *supra*), this rule applies.

Defendant's Argument Is Mostly a Quarrel with the Findings.

It would seem clear that under the rule of *Weiner v. Roof*, *supra*, the judgment must be affirmed. Assuming that the book-keeping entries in Chicago on November 12th and 15th constituted payment to defendant, it was a payment to it as agent for "Lofendo." Those entries were occasioned by fraud and mistake. And the payee, "Lofendo," was the defrauder itself, United Produce. Before defendant knew anything of the acts which it now claims to be payment, it was advised of the fraud on November 17th. It could not possibly thereafter make payments to itself as an innocent party having no notice.

The arguments by which defendant seeks to evade the effect of *Weiner v. Roof* are primarily a quarrel with the findings (Br. 56,

³¹1 Mechem 1064 points out that merely placing the funds to the principal's credit is no change of circumstances as will relieve the agent of the duty to repay the party who made the payment.

³²In the particular case the rule was held not to be applicable because the bank to which the funds were paid had before notice become a *holder in due course*. In the present case defendant never occupied that position.

57). We have discussed these arguments in the Statement of Facts, at pp. 20-23, *supra*, and shall not repeat.

Illinois Law and the Law Generally.

We have said that California law applies. Illinois law is the same.³³ In *Gillett v. Williamsville, etc. Bank*, 34 N.E.2d 552, 555, 310 Ill. App. 395, the court said that "where a check has been certified by mistake and the rights of third parties have not intervened, the certification may be revoked." *A fortiori*, if a formal certification may be revoked, internal book entries may be.

8 *Zollman on Banks and Banking*, p. 451, says:

"Banks like other corporations and individuals are subject to the rule that money paid under a mistake of fact may be recovered back.

* * * * *

"Conversely, they themselves may recover money paid by them by mistake. Where a collecting bank, under the mistaken belief that collection has been accomplished, pays the owner of the paper, it may recover such payment as paid by mistake or charge back a credit given to the owner unless the owner can show that his situation towards his debtor has through the action of the bank been changed to his prejudice or unless the bank has in fact become the owner of the unpaid instrument."

Defendant's Attempted Limitations on the Right to Recover for Mistake or Fraud Are Unsound.

Defendant argues that one may not recover when he knew the facts (Br. 102-3). But the findings negative the argument; the trial court found that plaintiff did act through mistake, that it was "deceived and misled by reason of the facts found * * * and the fraud perpetrated" (Finding XIII, R. 101).

³³In the absence of Illinois decisions plainly showing its non-statutory law to be different from that of California, it would be presumed to be the same. *Lefrooth v. Prentice*, 202 Cal. 215, 223, 259 Pac. 947; *Pratt v. Dittner*, 51 Cal. App. 512, 197 Pac. 365. Of course, it will not now be presumed that another state has a statute similar to that of the state where the court sits, since courts may now look at the statutes of other states. Cal. C.C.P., Sec. 1875(3); *Bowen v. Johnston*, 306 U.S. 19.

Defendant further argues that one may not recover if the mistake arose from his own fault or negligence (Br. 103). This is *not* the law, as the passage quoted at p. 66, *supra* from *Aebli v. Board of Education*, expressly shows. To the same effect is a decision of this Court, *Carstens v. McLean*, 7 F.2d 322 (9 Cir.).³⁴

In *National Bank of California v. Miner*, 167 Cal. 532, 140 Pac. 27, Miner received a check from Johnson drawn on the defendant bank, deposited it with plaintiff bank and received a conditional credit to his account.³⁵ The check was sent to the defendant, which delivered its cashier's check to the plaintiff. Later that day it discovered that Johnson had no funds with it, demanded back its cashier's check, and refused to pay it. It was sued upon its check.

Judgment against it was reversed. The court said (pp. 536, 537):

"* * * Extracts are taken from cases which, within their facts, are perfectly sound to the effect that, generally speaking, the certification of a check, or a cashier's check, imports absolute verity. But these cases are, one and all, in connection with facts where the certificate or check has been issued without mistake and certain underlying equities are sought to be advanced in opposition to its payment, or, *they are cases where by virtue of a change in the condition of the holder of the check it would be inequitable to allow the bank either to repudiate it or to advance defense against it.* * * *

"* * * 'It is now settled * * * that money paid under a

³⁴Nor do defendant's citations support it. Its quotation from 40 Am. Jur. 848, Sec. 194 is preceded in the text by the observation that the weight of authority is to the contrary; it is followed by the statement (p. 849) that despite a few earlier decisions, "the later cases establish the doctrine that it is not sufficient to preclude a person from recovering money paid by him under a mistake of fact that he had the means of knowledge of the fact."

³⁵The defendant's case there was not as strong as plaintiff's here, because the forwarding bank had already given credit to its own customer, whereas defendant here had done no such thing.

mistake of fact may be recovered back, however negligent the party paying may have been in making the mistake, unless the payment has caused such a change in the position of the other party that it would be unjust to require him to refund.' And the matter is summed up by this court in the following language: 'An examination of the cases will show that in all well considered adjudications recognition, tacit or express, is given to these principles. *Their ultimate analysis amounts to this: That plaintiff, even if negligent, may recover if his act has not changed the position of an innocent defendant to his detriment.*' * * *

The court also remarked that "a mere bookkeeper's stroke of pen" may always be rectified by another stroke of the bookkeeper's pen (pp. 538, 539).

Turetsky v. Morris Plan Industrial Bank, 22 N.Y.S.2d 514, is of interest because it comes from the very jurisdiction which has been the root of the mechanical rule on which defendant relies. The court said (pp. 515, 516):

"Plaintiff sues for the amount of two checks deposited with the defendant bank for collection and for which the drawee bank entered a credit in the defendant's account with it, after having stamped the checks 'Paid'. That credit was charged back about a week later to the drawee bank on the latter's claim that payment of the checks had been made by mistake, since payment had been stopped by the drawer. * * *

"While the drawee was the paying bank, it was also the agent of plaintiff to collect. * * * It has been held that banks paying out money by mistake may recover even though they were negligent in making the mistake, provided no damage had been suffered by the party receiving the money. * * * The drawee bank could demand return of the credit from the defendant as long as it had not in fact disbursed the moneys to the plaintiff. * * * The defendant could, without liability to plaintiff, withdraw the credit to him if in fact there had been a mistake and no damage

resulted to him from the failure to give him timely notice of the stoppage of payment.”

Defendant (Br. p. 51) cites *Restatement of Restitution*, Sec. 14, for the statement that a creditor or one having a lien on another's property who receives from a third party any benefit in discharge of the debt or lien need not return it, and it cites Section 13 for the statement that a person who innocently acquires title to something for which he has paid value need not restore it, as he would have to do had he not been innocent or had not obtained title or had not paid value. But plaintiff never paid any sum to the defendant for the purpose of discharging any debt that “Lofendo” may have owed to the defendant. Nor did defendant acquire title to the checks (p. 36, *supra*) or pay value for them (pp. 12, 17, *supra*), or have a lien on them (pp. 52-54, *supra*).³⁶

Lack of Good Faith.

Defendant has no standing unless it acquired through the swindler “Lofendo” a better right against plaintiff than “Lofendo” had. To do that it must show that *in subsequently* charging plaintiff's account, it acted *in good faith*. Under *Weiner v. Roof*, *supra*, that element is essential. But in charging plaintiff's account, defendant violated the commitment it gave plaintiff on November 17th and 18th (so found, see p. 59, *supra*). A violation of a commitment is obviously bad faith.

³⁶The case of *Hilliard v. Bank of America*, 102 C.A.2d 730, 228 Pac.2d 327 (D. Br. p. 53) is therefore not in point. There one A knew that B owed C money. He voluntarily and knowingly paid C the amount for the purpose of discharging B's debt. The fact that he did so believing that an automobile which B was selling to A belonged to B gave A no right to recover from C any more than if A had paid the money to B and B had paid it to C.

**Defendant's Legal Argument About *Weiner v. Roof*
Is an Attempt to Reduce It to Nonsense.**

Defendant's legal argument about *Weiner v. Roof* is illusive (Br. 64-72). It contends that the rights of plaintiff to recover were cut off on November 16, 1948 by an automatic offset of a debt to defendant from "Lofendo", of which defendant knew nothing, against an alleged debt of defendant to "Lofendo", of which it also knew nothing. Its alleged debt to "Lofendo" arose, it contends, by reason of the Chicago book entries. This is not so (see discussion, pp. 78 et seq.). But were it so, "defendant did not know until November 22, 1948" after notice of the fraud, "that the 6 checks had been stamped paid, and it never knew until after the present lawsuit had been instituted that bookkeeping entries had occurred at plaintiff's offices on November 15, 1948, with respect to the 6 checks" (Finding XIV, R. 102). "Lofendo's" debt to it arose from honoring checks of "Lofendo" against uncollected funds, but not until late on November 18th did it know that it had done so (see p. 11, *supra*).

In its own words, defendant's contention is that it was unnecessary for it to make *any* entries or engage in "*any* banking operation" in order to be a *bona fide* purchaser before notice (Br. 64) or even to know that it was purchasing anything or that there was anything for it to purchase!

This argument means that the agent need not, before notice, make *any actual application* of the funds against a debt owed it by its principal, in order to be entitled to keep the funds against the defrauded payer. If this view of the law were correct, then one who has been induced by fraud to pay funds to another as agent for the defrauder may never recover them, *so long as the defrauder is indebted to his agent*.

The contention refutes itself, for it makes nonsense of the reasoning of *Weiner v. Roof*, *supra*. Prior to *Weiner v. Roof* it was California law that the agent could *never* defend against a return of the money by claiming application upon a debt due

itself. The law protected all creditors, taking before notice, except the agent, and it discriminated *against* him. *Weiner v. Roof* removed the discrimination and put the case of application upon a debt due the agent on a par with application upon a debt of the principal to a third party. Defendant's argument would shift the law so far as to discriminate in *favor* of the agent, by preventing any recovery from the agent where the principal was indebted to it, for defendant would treat the mere existence of the debt as its automatic extinction.

The basic rule is that a payment made under mistake or fraud can be recovered unless the recipient "has thereafter in good faith changed his position" (21 Cal. Law Rev. 312, cited in *Weiner v. Roof*, *supra*, at 753). Change of position requires some act. If the act consists of discharging the principal's debt to the recipient agent, an *application* must take place. The words of *Weiner v. Roof*, at p. 753, quoting *Restatement of Restitution*, Sec. 143, at p. 579, are that "the agent may * * * apply such money upon an indebtedness of the principal to him." That is, he must make the *application*, in order to receive protection. Or as otherwise worded in the Restatement, at p. 579: "*A settlement of accounts with the beneficiary* is sufficient to bar restitution although the mere crediting to the beneficiary of the amount received is not * * *" Yet, under defendant's argument, neither settlement of accounts with the principal nor crediting his account is needed.

The cases cited in *Weiner v. Roof* at p. 753 all show that some definite act of application is necessary. We summarize these cases in a footnote.³⁷

³⁷In *Bradley Lumber Co. v. Bradley County Bank*, 206 Fed. 41, the principal's "note [to the agent bank] was satisfied and was surrendered" (p. 43). In *Lafarge v. Kneeland*, 7 Cow. 454, the moneys were "transferred to and credited on" the agent's account against one of the principals (p. 456): "the agent of the defendant has given credit to his principal and rendered him his account containing the credit." In *Winslow v. Anderson*, 78 N.H. 478, 102 Atl. 310, "defendant's settlement with

What defendant's contention overlooks—here as in other arguments—is that the issue is not one concerning the rights of defendant and “Lofendo” *inter se*—not one concerning the rights as between creditor and debtor or those deriving their rights *under* one of them. Here is a third party whose rights are not derived under, *but are superior to*, those of the two immediate parties, and the question is: Have those rights been cut off? The answer is patently no, because nothing was done before notice.

B. DISCUSSION OF THE RIGHT TO RECOVER WITH PARTICULAR REFERENCE TO THE 4 CHECKS FOR \$89,813.10.

Defendant received the “advice of credit” for the \$89,813.10. But before it sought to charge plaintiff's account with that sum or to credit the “Lofendo” account, it was already on notice that United Produce and “Lofendo” as a participant in the fraud had swindled the plaintiff out of more than a half million dollars. Not until after defendant awoke, late on November 18th, to the fact that it had carelessly permitted an overdraft in the “Lofendo” account of about \$175,000, did it seize on the advice of credit as the basis for charging plaintiff's account so as to obtain funds to cover the overdraft. But the overdraft was not caused by any

[its principal] of all matters between them was made months before the plaintiffs demanded that he should return to them the overpayment * * *” (p. 312).

Holland v. Russell, 121 Eng. Rep. 773, 1 B. & S. 424, *aff'd*, 4 B. & S. 1, and *Langley v. Warner*, 3 N.Y. 327, are also cases where the agent applied the money to a debt from the principal and made a settlement of accounts with the principal.

In *Hullett v. Cadick Milling Co.*, 90 Ind. App. 271, 168 N.E. 610, the agent received a check, deposited it in his account, drew one check to his principal and another check to himself. In *Bessler Movable Stairway Co. v. Bank of Leakesville*, 140 Miss. 536, 106 So. 445, the agent received a check, marked the principal's note to itself paid, and gave the principal a credit for the remainder.

In *Cullen v. Donahue*, 121 Atl. 392, 45 R. I. 237; *Mowatt v. McLean*, 1 Wend. 173 (N.Y.); *White v. Rutherford*, 148 S.W. 598 (Tex. Civ. App.), and *Taylor v. Metropolitan Ry. Co.* [1906], 2 K.B. 55, the agent received actual funds, physically turned over part to his principal and with the principal's consent kept part to satisfy a debt to himself from the principal.

reliance on the advice of credit or any assumption or belief that the 4 checks had been paid.

These facts, which *Weiner v. Roof* makes controlling, are clearly found by the trial court (see pp. 17, 19, 20, *supra*).

A major part of defendant's argument is an attack on the findings as to the time when the events occurred. We have discussed this in the Statements of Facts (at pp. 20 to 23, *supra*), and shall not repeat. Indeed, defendant was on notice as early as November 10th, for on that day it had concluded that something dishonest was going on between Lofendo and United Produce (so found, R. 105, and see discussion at pp. 101 and 102, *infra*).

In fact, defendant confines itself to the question of the moment of entering credit to the "Lofendo" account. But merely crediting a principal, no matter when it occurs, will never protect the agent (pp. 67, 68, *supra*). More important is the moment of *charging* the \$89,813.10 *against plaintiff's account*.

And no matter how the evidence is juggled or how "book entries" are separated from "banking operations", that charge did not occur until late on November 18th or on the 19th, i.e., *after* the whole story of the fraud had been told defendant (p. 21, *supra*).

Thus defendant knew all the facts which would have entitled plaintiff to recover the \$89,813.10 from "Lofendo", *if* defendant had already charged plaintiff and turned that sum over to its customer. Consequently, defendant had no right, *thereafter*, to charge the plaintiff.

Defendant quibbles. It argues that even though United Produce had defrauded plaintiff of over \$500,000 (Br. 60), it was possible that plaintiff had made no mistake in paying the particular 4 checks. But full knowledge is not necessary. Notice is enough. By averting its gaze defendant could not put itself in the status of a bona fide purchaser for value.

Defendant also quibbles (Br. p. 60) that the 4 checks were not mentioned in the conversation of November 17th and 18th. We have related the circumstances at pages 23-25, *supra*, and they do defendant no credit. The situation comes to this:

1. Defendant's own conduct misled the plaintiff with respect to the \$89,813.10;
2. Nothing that plaintiff did caused the defendant to change its position in the assumption that the \$89,813.10 was collected, and it never did change its position in reliance.
3. Defendant was on notice of the fraud;
4. Its conduct in seizing advantage of the advice of credit was surreptitious.

The rule of *Weiner v. Roof*, which in certain circumstances precludes the original payer from recovering his money, is nothing but an application of the equity rules about the intervention of the rights of "bona fide purchasers for value". Defendant must show that it was a "bona fide purchaser of the money". *Weiner v. Roof* cites Restatement of Restitution, Sec. 143, and Restatement of Agency, Sec. 339. Comment c, p. 581 of Section 143 states that

"If the fiduciary makes a payment *with knowledge of the ground for restitution*, the payment is not a defense. This is true both where the fiduciary obtained the money or other things by a consciously wrongful act and *where before payment over, he was aware of fraud or duress of the principal or of the mistake by the transferor.*"

Comment f of Section 339, p. 747, states:

"If the agent has notice that the other has rescinded or, if he learns of facts from which he should realize that the other is entitled to and will demand rescission, as where the agent or principal was fraudulent in inducing the transaction, a subsequent change of position does not relieve him from the duty of returning what he has received."

On November 17th and 18th defendant knew facts from which it did realize that plaintiff was entitled to rescind as to the \$89,-

813.10, and it knew that plaintiff would do so if it should learn that defendant had not acted in reliance on the advice of credit prior to November 17th. And so it concealed the fact as long as it could (see pp. 24, 25, *supra*).

V.

The Six Checks Were Never "Paid" or "Collected"

In the foregoing discussion we have assumed, for the sake of argument, that the acts transpiring in Chicago—the perforation of the checks and the notations on plaintiff's internal records—constituted "collection" as defendant contends. But this is not the fact.

The trial court *found* that the checks "never were in fact paid or collected" (Finding XII, R. 100). And it held "that the bookkeeping entries of plaintiff did not constitute payment of checks sent for collection" (Conclusion III, R. 114).

Courts repeatedly say, with 8 *Zollman on Banks and Banking*, p. 322:

"No mere bookkeeping between a bank and its correspondent for the collection of money can change the actual status of the parties or destroy rights which arise out of the real facts of the transaction. * * *"

In *Steinhart v. National Bank*, 94 Cal. 362, 29 Pac. 717, discussed at pages 47-49, *supra*, the court said (p. 367):

"* * * And the fact that the note was mutilated, and marked 'canceled,' did not affect the plaintiff's right to sue upon it, since this matter could all be explained and accounted for."

In *Guardian National Bank v. Huntington County State Bank*, 187 N.E. 388, 206 Ind. 185, the court pithily observed (p. 390, 1st col.):

"Whether the question involved is payment or acceptance, the entries referred to can have no significance. An inten-

tion to pay is not payment, for, *even though one may have procured the money with which to pay, and made an entry in his books showing payment, and delivered the money to his servant or agent with instructions to pay, and started the agent or servant on his way to make payment, yet he may reconsider, recall his servant, change his entries, and there is no payment.* And the same is true concerning the acceptance of an offer; one may decide to accept and prepare a letter of acceptance and give it to his servant with directions to deliver, and the servant may be on his way, but he may be recalled and the terms of the acceptance altered or withdrawn altogether, which is as if all these transactions had merely taken place in the mind."

In *Friedman v. Irving Trust Company*, 300 N.Y.S. 51, it was held that where a forwarding bank sent a check to another for collection, the mere reduction on the latter's books of the indebtedness due to it from the forwarding bank, in an amount equal to the check, is only an accounting procedure and does not constitute payment. That, of course, applies precisely to the entry by plaintiff here on its ledger showing the state of its account with defendant.

Many other courts have held that marking negotiable paper paid, charging the drawer's account, and the like, are irrelevant; e.g., the very recent case of *Boblig v. First National Bank*, 48 N.W.2d 445 (Minn.), and *Pacific National Agricultural Credit Corporation v. Wilbur*, 2 Cal.2d 576 at 585, 42 Pac.2d 314, particularly where the bank does not go so far as to surrender the paper to the maker (cf. fn. 53 on p. 97, *infra*).³⁸

³⁸See also 8 *Zollman*, p. 222; *Omaha National Bank v. Brady State Bank*, 204 N.W. 796; *Rodgers v. Farmers Bank of Nolanville*, 264 S.W. 491 (Tex. Civ. App.); *Lincoln County v. Gibson*, 255 Pac. 119 (Wash.); *Rock Island Plow Company v. Perry*, 20 S.W.2d 956 (Mo. App.).

The question of what constitutes payment sometimes arises where the forwarding bank becomes insolvent and the maker therefore sues the collecting bank or vice versa. 8 *Zollman on Banks and Banking*, p. 322, says:

"The fact that a collecting bank credits the forwarding bank with the proceeds of a collection does not prevent the owner from recover-

A. DEFENDANT'S ARGUMENT IS VITIATED BY THE MAJOR FALLACY OF IGNORING THE FACTS OF THIS CASE AS TO THE NATURE OF THE COLLECTION CONTRACT.

Defendant concedes that when it received the checks from "Lofendo" and sent them to plaintiff, both it and plaintiff were merely agents of the payee for collection. But it argues that the Chicago bookkeeping entries changed the relationships. By some automatic transmutation, so it contends, it ceased to be the payee's agent and became its debtor, and plaintiff ceased to be payee's agent and became *defendant's* debtor.

This ignores the contractual arrangement *proved* and *found* in *this* case.

A basic rule is that *collection arrangements are contractual*. The holder of a check who wishes it collected, the forwarding bank, and the collecting bank may fix their several relationships in whatever form they wish. The agreement may be stated in express words. It may be filled out by settled custom or usage, or by the course of dealing and practice between the parties. It may be supplemented by statute. It may supplant what would otherwise be the law. *Security etc. Bank v. Southern etc. Bank*, 74 Cal. App. 734, 742, 241 Pac. 945; *Lucke v. First Nat. Bank*, 193 Cal. 184, 187, 189.

For example, an Illinois case cited by defendant, *American Exchange Nat. Bank v. Gregg*, 28 N.E. 839, 138 Ill. 596, states (p. 840):

"In determining the legal effect of such transactions we must apply the same rules applicable to all contracts and business affairs, and carry out the intention of the parties, to be

ing such amount from the collecting bank upon the insolvency of the forwarding bank, since the mere credit can give the collecting bank no additional rights as against the owner. Such credit does not change the relationship of the forwarding bank toward the owner to one of debtor and creditor, or prevent the owner from recovering the proceeds from the collecting bank."

gathered from their acts and declarations, and the accustomed and understood course of the particular business.”³⁹

8 *Zollman on Banks and Banking*, p. 358, points out:

“Most bank transactions leave but slight evidence in the nature of writings. The reasonable customs and usages of banks therefore are freely resorted to for the purpose of determining the understandings of the parties.”

And at p. 389 it says:

“A bank cannot be an agent for collection and a debtor at the same time. It is either the one or the other. Whether it is the one or the other at a particular time depends on the intention of the parties in regard to the disposition of the proceeds as evidenced by custom or agreement, *and hence will frequently be a question for the jury.*”

A finding in a non-jury case is equivalent to a verdict and will differentiate the case from any citations where a different contract was found by the trier.

Another Illinois case, *People ex rel. Nelson v. Peoples Bank & Trust Company*, 187 N.E. 522, 353 Ill. 479, makes the point clear. The opinion (which is too full of meat for partial quotation and too long to quote in full) cuts to the heart of the matter: The original agency relationship cannot turn into something else unless such was the agreement of the parties—(a) the depositor, (b) the forwarding bank and (c) the collecting bank. The forwarding bank does not cease to be the depositor’s agent and become his debtor, and the collecting bank does not cease to be the depositor’s agent and become the debtor of the forwarding bank, unless and until it was the agreement of the parties that these changes should occur.

³⁹Another of defendant’s citations, *Dean Tobacco Warehouse v. American National Bank*, 123 Tenn. 365, 117 S.W.2d 746, remarks (748) that all rules about collections “may be varied by contract, express or implied.”

In *Dakin v. Bayly*, 290 U.S. 143, the Supreme Court observed: "Could any position taken by the Clearwater Bank [forwarding bank] of its own initiative affect without the depositor's consent the pre-existing relation of principal and sub-agent between the depositor and the St. Petersburg Bank [collecting bank]? We think not." (p. 150)

Nor can the changes in relationship be affected without the agreement of all the parties.

The vital question is therefore this: *What was the contract, in the facts of this case? It is more important to look at the record than to heap up citations involving different sets of facts.*

1. The Findings.

At pages 12, 13, *supra*, we saw that the trial court found the terms of the contract to be this:

Collection and payment of checks sent by defendant to plaintiff were to be consummated only by a charge made against plaintiff's account on defendant's books in San Francisco, and only upon an unrevoked authorization to make the change. Nothing short of that would change the relationship of the parties, whereby both plaintiff and defendant were merely agents for the payee.

2. The Evidence Supports the Finding.

At pages 13-16, *supra*, we showed that the finding was required by the evidence. We pointed to the testimony of defendant's own officers as to uniform custom and practice.

We also pointed to the fact that "*collection letters*" were used, and not "*cash letters*," and we noted the different contractual arrangement implicit in the use of these documents. Where a "cash letter" is used, the entry of credits, the making of book-keeping entries, may constitute payment unless revoked by charge-

back within a specified time. But in case of a "collection letter," payment can occur only after action upon affirmative advice.

Defendant's Contemporaneous Conduct.

There is other compelling evidence in addition to that noted at pages 13-16, *supra*.

The law attaches a binding force to the practical or contemporaneous construction by the parties of their contracts. *Universal Sales Corp. v. Cal. etc. Mfg. Co.*, 20 Cal.2d 751, 128 Pac.2d 665; *Tanner v. Title Ins. & Trust Co.*, 20 Cal.2d 814, 129 Pac.2d 383; *Johnston v. Landucci*, 21 Cal.2d 63, 130 Pac.2d 405; *Kales v. Houghton*, 190 Cal. 294, 212 Pac. 21.

As *Cal. Civ. Code*, Sec. 3535, declares: "Contemporaneous exposition is in general the best." One of the leading cases on the subject is *Mitau v. Roddan*, 149 Cal. 1, 84 Pac. 145, and we quote its definitive statement in a footnote.⁴⁰

⁴⁰"Parties to a contract have a right to place such an interpretation upon its terms as they see fit * * *. And in all cases where the terms of their contract, or the language they employ, raises a question of doubtful construction, and it appears that the parties themselves have practically interpreted their contract, the courts will follow that practical construction. It is to be assumed that parties to a contract best know what was meant by its terms, and are the least liable to be mistaken as to its intention; that each party is alert to his own interests, and to insistence on his rights, and that whatever is done by the parties contemporaneously with the execution of the contract is done under its terms as they understood and intended it should be. Parties are far less liable to have been mistaken as to the intention of their contract during the period while harmonious and practical construction reflects that intention, than they are when subsequent differences have impelled them to resort to law, and one of them then seeks a construction at variance with the practical construction they have placed upon it. The law, however, recognizes the practical construction of a contract as the best evidence of what was intended by its provisions. In its execution, every executory contract requires more or less of a practical construction to be given it by the parties, and when this has been given, the law, in any subsequent litigation which involves the construction of the contract, adopts the practical construction of the parties as the true construction, and as the safest rule to be applied in the solution of the difficulty." (pp. 14, 15).

In this case there are two striking episodes of contemporaneous construction:

(a) Defendant agreed on November 17th and 18th not to charge plaintiff's account (see p. 59, *supra*). Wholly apart from its binding effect as a contract (see pp. 60-64) this agreement shows the practical construction by the parties of the arrangement between them for collections sent by defendant to plaintiff by means of a "collection letter." It shows that receipt and action upon an advice of credit was an absolute necessity to any change of relationship or rights.

Thus defendant wrote its bank manager, "We must recognize their [plaintiff's] instructions" (R. 1174A). And its counsel advised on November 18th that the plaintiff was "entirely within its rights in revoking this credit" and that defendant would "pay against that credit at their peril" (R. 459).

This agreement of November 17th and 18th that no charges would be made against plaintiff's account was a recognition by defendant that it had no right to take any other position! This was not just a legal conclusion—it was a recognition of the meaning of the collection arrangement. And it is a complete answer to the involved reasoning, later conceived by defendant, by which it now asks for a different interpretation.

(b) Although defendant presumed, on November 17th, from the telephone conversation with plaintiff, that the several book-keeping entries had occurred in Chicago on November 15th (R. 349), it did not enter the collection as paid. It waited until the advice of credit was received on November 19th. It stamped its retained copy of the collection letter as "Paid, November 19, 1948" (R. 1193). And it prepared a credit tag showing collection effected on November 19th (R. 1184).

Defendant's Contract with Its Customer.

Defendant's rules and regulations were incorporated into its contract with customers. Under them no customer placing a check

with it for collection could contend that it was "paid" until defendant obtained the funds in hand. This is also true under the California Bank Act. We showed these facts at pages 57-59, *supra*.

Evidence Relied on by Defendant.

Against this overpowering mass of evidence defendant merely notes (Br. 35, 36) that the collection letter carried the instruction "Please dispose of all proceeds as indicated by letter 'K' " and that the letter "K" reads: "Credit Bank of America N. T. & S. A. with advice to this branch."

But these instructions do not refer to a mere book entry on plaintiff's records in Chicago. In the context of the relationship of the two banks, the established customs and practices, and the fact that defendant had no account with plaintiff but plaintiff had one with defendant, the request in the collection letter to credit Bank of America was a request by defendant for written authority to credit itself by charging plaintiff's account in San Francisco. (See testimony quoted at pp. 15, 16, *supra*.) Until all this occurred the funds were not "disposed of."

Plaintiff's Internal Entries in Chicago Were the Same as a Depositor's Notations on His Check Stubs.

The fact is all the clearer when it is observed that the event upon which defendant relies as radically changing the relationship of the parties is merely the entry in plaintiff's private record of the amount of money that defendant owed to plaintiff. Plaintiff had an account with defendant. When it made a deposit with defendant, it made an entry in its private record. When it gave an order to defendant to pay out of its account, i.e., mailed an advice of credit, it made an entry. In every respect this is the same as the act of any man with a checking account who enters his deposits and his checks on his check stubs. These notations are for his own information; they do not affect the state of his account. He may tear up a check before mailing it, or stop pay-

ment, and his bank cannot insist on charging his account because of his entries on his check stub.

The bank in which an account is kept periodically sends to the depositor a copy of its ledger sheet of the account. This is the monthly statement. Defendant sent such a statement to plaintiff. But the depositor does not send to the bank a copy of his check stub or other personal record of his account. And so here, *plaintiff's record of its account with defendant was an internal document, never intended for transmittal to defendant, and no copy, transcript or statement of it ever was sent to defendant* (so conceded, D. Br. 37).

In *Guardian National Bank v. Huntington County State Bank*, 187 N.E. 388, 206 Ind. 185, entries had been made in a check journal and cash sheet. The court held that these entries were not payment because the records were part of a system of book-keeping maintained for the bank's own convenience.⁴¹

Most of Defendant's Citations Are Not in Point Because They Involve a Different Contractual Arrangement Than Was Here Proved and Found.

Decisions in cases where a different contractual arrangement between the parties has been proved are not in point. This fact eliminates most of defendant's citations, out of hand.

For example, if the custom of the locality or the arrangement of the parties is that the collecting bank should remit by its own draft, and if the law will permit, some courts have held that the parties have agreed that the collecting bank should become the debtor when it forwards its draft. Such is the case of *O. B.*

⁴¹Defendant's brief (p. 21) cites a short passage from 9 C.J.S. 502 but fails to quote what immediately follows:

"Where such items are sent by mail to the drawee bank, it is not bound until it has done something which is the equivalent of paying them or accepting them as a credit to the account of the remitter. *Entries in a portion of the bank's system of bookkeeping which are intended for its convenience and to expedite its business, but are not intended for delivery to its depositors or as a record of the accounts with them, are not material.*"

Avery v. Highway Commissioner, 2 N.E.2d 77, 363 Ill. 279 (cited Br. 20).

Cash Letter Cases.

A major example of a kind of contractual arrangement different from that proved here is the case of collection by means of "cash letters" rather than by "collection letters". And a major vice in defendant's argument is that it ignores the stipulated difference between the two (see p. 14, *supra*). The bulk of bank collections is by cash letter, and the bulk of reported decisions are cash letter cases. They are therefore not in point, because the 6 checks and the 4 checks went forward by "collection letter".

In a cash letter case the forwarding bank gives immediate credit to its depositor and every bank in the collection chain gives immediate credit to its forwarder. The essential significance of a cash letter is that collection is deemed effected unless notice of rejection is given in a specified time.

If a bank gives credit in the first instance but takes the paper for collection and not as owner (see p. 36, *supra*), the credit is conditional and the paper goes forward on a "cash letter".⁴² In such a case each bank in the collection chain also gives immediate credit, likewise conditional. When the collection occurs, the condition is fulfilled, and it is theoretically possible to say that the credit, theretofore conditional, becomes unconditional along the whole collection chain. In such a case some few courts have held that the agency relationship ceases and a debtor-creditor relationship arises between the links of the chain.⁴³ Most

⁴²As stipulated, where credit is given, collection letters are not used.

⁴³This was precisely the reasoning in *Dean Tobacco Warehouse Co. v. American National Bank*, 123 Tenn. 365, 117 S.W.2d 746. A conditional credit was given in the first instance and the deposit ticket authorized the forwarding bank to accept a credit from the collecting bank in lieu of cash. The court said that under the agreement of the parties, when the collecting bank gave its credit, the conditional credits became absolute (p. 748).

courts *still insist* that the relationship remains that of principal and agent until the funds are transmitted and become available to the forwarding bank by receipt of notice that the funds have been collected. *Beane v. First National Bank and Trust Company*, 92 F.2d 382 (4 Cir.).

Where a "collection letter" is used, as here, no credits have yet been entered by any bank at all. The essential significance of a collection letter is that collection is deemed not effected until the forwarding bank is advised that it has been and acts accordingly. The debtor-creditor relationship cannot spring into being until a credit is actually entered by the first bank to its customer. Here defendant entered no such credit to Lofendo until after it was notified of the fraud.

We know of no case holding that where credit has never been entered, as in the case of a collection letter, a liability of the forwarding bank to the depositor can spring up before any entry whatever to his account.

People v. Sheridan Trust & Savings Bank, 193 N.E. 186, 358 Ill. 290, cited by defendant, makes the matter clear. There the first bank gave immediate though conditional credit to its depositor, and each bank in the chain of collection gave a like credit to the previous one. Defendant quotes from the opinion but omits a revealing sentence preceding what it quotes and another in the middle of its quotation (p. 191):

"By the deposit of the check in the general checking account of the candy company, the relation of debtor and creditor was created, but by force of the agreement and custom applicable to out of town *cash* items, the agreement *suspended* the relation of debtor and creditor pending the collection of the check.

* * * * *

"The credit extended to the candy company [depositor] under the date of June 4 in its passbook *required nothing further to be done on the part of the bank in the way of any*

bookkeeping entries as between the Sheridan Bank and the candy company."

Unlike in the *Sheridan* case, here the 6 checks and the 4 checks were not received by defendant as a deposit, and everything still remained to be done in the way of book entries in the defendant bank, both in the account of Lofendo and in the account of plaintiff.

The following additional citations of defendant are cash letter cases. *Hekler v. Ward*, 21 F. Supp. 710, *Hallenbeck v. Leimert*, 295 U. S. 166, *Gillett v. Williamsville State Bank*, 34 N. E.2d 552, 310 Ill. App. 395, *First National Bank of Corsicana v. Wm. Cameron & Co.*, 149 S.W.2d 132 (Tex.), *Avery v. Highway Commissioner*, supra, *Dean Tobacco Warehouse Co. v. American National Bank*, supra, *Oregon Iron & Steel Co. v. Kelso State Bank*, 129 Wash. 109, 224 Pac. 569; *Storing v. First National Bank of Minneapolis*, 28 F.2d 587, *Rickey v. New York State National Bank*, 7 F. Supp. 29; *First National Bank of Richmond v. Davis*, 114 N. C. 343, 19 S.E. 280; *Maget v. Bartlett Bros. Land & Loan Co.*, 41 S.W.2d 849, 226 Mo. App. 416.⁴⁴

Cases Where the Forwarding Bank Has a Deposit Account with the Collecting Bank.

Another example of a contractual arrangement different from that proved and found here may be seen in cases where the forwarding bank has a *deposit account in the collecting bank* and asks the collecting bank to enter a credit in that deposit account. If the law of the state where the depositor and forwarder are

⁴⁴That these are cash letter cases is shown either by quotation of the letter, e.g., in the *Avery* case, the letter recites "Items are cash, not collections," or by the fact that the items went through the clearing house, or that immediate credits were entered, or that the letter covered items of more than one customer. All these signify a cash letter, as stipulated (p. 14, supra). In the *Rickey* case it is said that it was the "custom and practice" between the two banks involved for the forwarding bank to charge the account of the collecting bank one day after sending out the item for collection and before advice of collection. This is similar to a cash letter collection and unlike collection letter procedure as stipulated here.

located will permit,⁴⁵ then such a credit may be what the parties bargain for. Such is the case of *First National Bank of Corsicana v. William Cameron & Co.*, 149 S.W.2d 132 (Tex.) (cited Br. 34).⁴⁶

In the present case defendant had no deposit account with plaintiff. The reverse was the case (p. 59, *supra*).

In this connection defendant refers to cases of "reciprocal accounts" between collecting and forwarding bank (Br. p. 32). The present case is not one of reciprocal accounts. But even in such cases, as shown in 8 *Zollman on Banks and Banking* 401 (footnote 1) no alteration in the relationship of the parties is effected upon an entry on the books of *just one* of the banks. It is effected only upon a *reciprocal crediting on the books of the one and debiting on the books of the other*. Both must occur, and the important entry is the charge on the books of the bank where the deposit account is maintained. Cf. *Friedman v. Irving Trust Co.*, 300 N.Y.S. 51, discussed at p. 79, *supra*. Defendant's own citations show that fact. For example, *Maget v. Bartlett Bros. Land & Loan Co.*, 226 Mo. App. 416, 41 S.W.2d 849 at 858 (first col.) refers to the "'reciprocal accounts' method of payment, whereby payment is accomplished on the books of the two banks, and, when such crediting and debiting is properly accomplished, such is valid payment by operation of law."

Reciprocal account cases are cash letter cases. The forwarding bank enters a charge to the other on its own books when it sends the collection out. Then when the other bank makes *its* entry, reciprocal entries exist. In a collection letter case there can be no reciprocal entries until an advice of credit comes back and is properly acted on.

⁴⁵In California this is forbidden. See pp. 58, 59, *supra*.

⁴⁶As stated (149 S.W.2d 132 at 133): "The Corsicana Bank [collecting bank] * * * debited the account of the School District [drawer of the check] and credited the *regular deposit account* of the Blooming Grove Bank [forwarding bank] with the same amount."

The rationale of reciprocal accounts is illustrated by the discussion in *Dakin v. Bayly*, 290 U. S. 143. Justice Stone there dissented, saying (p. 156):

"Other circumstances make the present case * * * one for denying to the petitioner any right to assert that the drafts * * * are held upon an agency. The two banks, as the court below pointed out, were mutual agents for collection. *On the record* we must take it that *they dealt with each other as the owners of the collection items* which each bank received from the other without notice of the interest in them of the other's depositors for collection. * * * when banks mutually act as agents for collection, each for the other, and paper *transmitted for collection appears on its face to be the property of the transmitting bank* and remitted for its account, they are entitled to settle their mutual demands for items collected by striking a balance, no matter who the owner of the collected items may be."

Now *only in a cash letter case* can the facts be those on which this reasoning proceeds. A cash letter represents that the original bank has given credit to the depositor, and, therefore, so far as the collecting bank knows, the forwarder may have become the owner.

But a collection letter represents that credit has *not* been given to the depositor. It therefore states that the forwarding bank is not the owner but only the agent. "On the record" of this case the two banks did not deal on the basis that defendant owned the 6 checks or the 4 checks.

In an annotation in 118 A.L.R. 363-382, it is shown that if the collecting bank does not know that the forwarding bank is a mere agent for collection, some courts hold that entries by the collecting bank to an account of the forwarder may affect the rights of the parties, and some courts hold not. But all courts hold that such entries do not affect the rights or alter the relationships of the parties where the collecting bank knows that the forwarding bank is a mere agent for collection. The latter, of course, is neces-

sarily the case where a "collection letter" is used, as the stipulation shows. Cf. *Goggin v. Bank of America*, 183 F.2d 322, 326, fn. 4, 2d col.

Cases Covered by Clearing House Rules.

Another example of cases cited but involving a specific contractual arrangement controlling the rights of the parties is that where the checks go through clearing houses. Parties may be bound by clearing house rules, i.e., by contract, to supplement or supplant the law. *Security etc. Bank v. Southern etc. Bank*, 74 Cal. App. 734, 742, 241 Pac. 945; *Merchants Nat. Bank v. Continental Nat. Bank*, 98 Cal. App. 523, 540, 541, 277 Pac. 354.

B. A SECOND MAJOR FALLACY IN DEFENDANT'S ARGUMENT IS THAT IT CONFOUNDS DIFFERENT SENSES IN WHICH THE TERM "PAYMENT" IS USED.

Plaintiff occupied two different capacities relative to the 6 and 4 checks sent to it for collection. First, it was the bank on which the checks were drawn; as such it was the agent of the maker, United Produce, to pay the checks. Second, it was the bank to which the checks were sent for collection; as such it was the agent of "Lofendo", the payee, to present the checks for payment and after collection to transmit the funds to the payee.⁴⁷

As pointed out in *O'Neil v. First National Bank of Lovelock*, 15 F. Supp. 133 (D.C. Nev.) (already referred to, p. 57, supra).

"The word 'Payment' appears to have both a broad and a restricted meaning dependent upon its use in respect to particular banking transactions * * *." (p. 137)⁴⁸

⁴⁷A check may be sent for collection to the bank on which it is drawn. It then occupies the two capacities noted. *Turetsky v. Morris Plan Industrial Bank*, 22 N.Y.S.2d 514; 8 *Zollman on Banks and Banking* 328. *Nineteenth Ward Bank v. First National Bank*, 184 Mass. 49, 67 N.E. 670, cited by defendant, notes the distinction between the two capacities.

⁴⁸In *Maget v. Bartlett Bros. Land & Loan Co.*, 226 Mo. App. 416, 41 S.W.2d 849 at 857 (2d col.) the court, speaking of the "question as to when a check is paid" says, "A general and concise answer to this question may not be given because of the varied elements entering into different transactions."

It may mean (1) payment by the maker through the bank as drawee; or (2) subsequent transmission by the bank as collecting agent to the payee or the payee's forwarding agent.

The question whether there has been payment in the first sense may arise between the maker and the payee or the maker and his bank; for example, where the issue is whether a stop payment order is too late. A number of defendant's citations merely involve "payment" in this sense.⁴⁹

The question whether payment has been made in the second sense arises as between the payee and the collecting bank or between forwarding and collecting bank.

As said in the *O'Neil* case, *supra* (p. 138):

"* * * it appears that while receipt of a check or draft through the mail by the drawee bank and actual charge thereof against the account of the drawer and cancellation of the check or draft *constitutes payment thereof so far as the drawer is concerned so that payment thereafter may not be stopped, nevertheless it does not constitute payment in due course until actual receipt by the payee of the amount of money specified or equivalent credit.*

"The agreement entered into between the two banks on February 2, 1930, authorized the Sacramento Bank to 'charge back any item before *final payment*, whether returned or not.' *The expression 'final payment', as there used, clearly means something more than a mere charge on the books of the drawee bank against drawer bank and cancellation of the check or draft.*"

Many courts reject the view that stamping checks as paid or making a charge on the books constitutes payment even as against the maker's effort to stop payment. They hold that nothing short of actual disbursement of funds will do, condemn the other rea-

⁴⁹E.g., *O. B. Avery Co. v. Highway Commissioner*, 363 Ill. 279, 2 N.E. 2d 77; *Nineteenth Ward Bank v. First National Bank*, 184 Mass. 49, 67 N.E. 670.

soning as circular, denominate it as an absurdity and decline to follow it. *Boblig v. First National Bank*, 48 N.W.2d 445 (Minn.) decided April 13, 1951.

But even the courts accepting the other view refuse to extend the notion of "payment" to remittance by the collecting bank to the holder or the holder's agent.

Even if it were to be said that plaintiff had transferred the funds from one pocket as agent of the maker of the checks, United Produce, to another pocket as collecting agent of the payee, "Lofendo", that would not mean that it had transmitted the funds to "Lofendo" or to his other agent, the defendant. The manner in which the funds were to be transmitted was fixed by the parties' contractual arrangement. And before transmission in the agreed manner, plaintiff had the right to go no further on discovery that maker and payee were one and that the checks were a fraud.

Across-the-Counter Cases.

For a similar reason other cases cited by defendant are inapplicable.⁵⁰ Where one has his own deposit account in a bank and deposits in that account a check drawn on the same bank, the act of crediting his account constitutes payment, because the situation is the same as if he had presented the check, received the cash, pushed it back across the counter, and redeposited it.

The rationale of the rule does not apply to mail collections or a case where the payee has no deposit account in the drawee bank. 9 C.J.S. 502, quoted at p. 86, fn. 41, *supra*; *Guardian National Bank v. Huntington County State Bank*, 187 N.E. 388, 206 Ind. 185, 92 A.L.R. 1056, and the recent case, *Boblig v. First National Bank*, 48 N.W.2d, 445 (Minn.).

⁵⁰*Hay v. First National Bank of Springfield*, 244 Ill. App. 286 and *American Exchange National Bank v. Gregg*, 28 N.E. 839, 138 Ill. 596.

In the *Guardian* case the court said (p. 389, 2d col.):

"But we have no such situation here. These checks were sent by mail, and the drawee bank was not bound until it had done something which was the equivalent of paying the checks or accepting them as a credit to the account of the remittor."

Neither "Lofendo" nor defendant tendered checks to plaintiff for deposit.

C. A THIRD FALLACY LIES IN CITING CASES INVOLVING THE RIGHTS OF HOLDERS IN DUE COURSE OR NOT INVOLVING FRAUD OR MISTAKE.

A third major fallacy vitiating defendant's citations is that they involve the rights or obligations of the owner or holder in due course, not of a collecting bank with respect to a previous bank in the collection chain which had not become the owner. Nor do they involve fraud or mistake.

If United Produce (through a dummy) had opened an account with plaintiff on November 12th under the name of "Lofendo" with the 4 checks as an initial deposit, and had deposited the 6 checks on November 15th, and plaintiff had charged United's account and credited this new "Lofendo" account, the situation would have been an across-the-counter one, with the added element of fraud. United could not have contended that there was payment. Transferring a portion of the fictitious credit standing in its name into another name would not surround it with an iron fence so as to protect United in the fruits of its fraud.

American Exchange National Bank v. Gregg, 138 Ill. 596, 28 N.E. 839, cited by defendant, makes this clear. The heart of the decision was this (p. 841):

"Where a check is offered as a *deposit* and received as such, the check being genuine, *in the absence of fraud* the bank becomes the debtor of the depositor, and the title of the depositor passes to the bank, and no reason is perceived why the business should not be a conclusive and an executed one between the two parties and their depositors."

In *Gillett v. Williamsville State Bank*, 34 N.E.2d 552, 310 Ill. App. 395, the plaintiff was the payee, not her bank which sent the check by cash letter through an intermediate bank to defendant. Defendant marked it paid, but later in the day returned the check and applied the balance in the drawer's account on a note due it from him.

A judgment for defendant was entered upon a directed verdict without evidence by defendant. The judgment was reversed, because an inference was possible that defendant had accepted the check. The acceptance would be ineffective, *if made through mistake*, but that was a question of fact that should have been left to the jury, the finder of the facts (pp. 555, 556, top). And defendant having introduced no evidence, there was enough to infer that the maker had sufficient funds on deposit to pay the check, and there was no evidence of fraud perpetrated by him on his bank.⁵¹

People ex rel. Nelson v. Sheridan Trust and Savings Bank, 358 Ill. 290, 193 N.E. 186, was a claim by the payee against his own bank [e.g., *Lofendo v. Bank of America*].

Numerous cases cited from other jurisdictions are not in point for the same reason.

In *Security National Bank of Sioux City v. Old National Bank*, 241 Fed. 1, the plaintiff bank was not a collecting agent. It was a holder in due course.⁵² The essential basis of the decision is expressed in one paragraph (p. 8) which states: (1) that where a bank honors a check of a depositor in the belief that his credit

⁵¹Relative to the right of defendant bank to offset the maker's note against his balance, the court said that defendant had offered no evidence that the note was mature or that there was a contract permitting offset before maturity. The contrary is true in the present case (see p. 50, supra).

⁵²The customer had deposited the checks and received an absolute credit in his general account subject to the right to immediate check. Title to the checks was thereupon transferred to the bank, and it simply became his debtor (p. 8).

balance is larger than it is or in the belief that checks which it has credited to his account will be paid, it is estopped "as against the owner of such paid note, check or draft" from revoking or avoiding payment; and (2) that one essential reason for this conclusion is: "because the owner of the note, check or draft has no means of knowing the state of the customer's account."

The rule protects only the owner of the check. The reason is that the owner does not know the state of the customer's account. Yet, here the *owner* and the *customer* were identical, namely, United Produce.⁵³

Hayes v. Tootle-Lacy National Bank, 72 F.2d 429, follows the *Security* case, *supra*, involved the rights of a holder in due course, and recognized that a transaction is not closed or irrevocable where there has been fraud or mistake (p. 432).

In *Oregon Iron & Steel Co. v. Kelso State Bank*, 129 Wash. 109, 224 Pac. 569, the court quotes the passage from the *Security* case, *supra*, as the key to its decision, emphasizes "the absence of fraud" (p. 572, 1st col.), and the fact that the payee was not party to an illegality (p. 572, 2d col.).

In *Hallenbeck v. Leimert*, 295 U. S. 116, the bank had become the holder in due course, the checks having been deposited in the customer's account and not taken for collection. The court noted (p. 123), "The record reveals no attempt to recover because of fraud, mutual mistake, or other similar circumstance."⁵⁴ This was

⁵³The court also emphasized (p. 9) that after defendant stamped the paper as paid and charged the maker's account, it surrendered the paper to the maker and mailed its draft in payment to the plaintiff, who sued upon the draft.

In the present case, as the trial court found, "plaintiff did not notify United Produce Company of the occurrence and never surrendered the 6 checks to it" (R. 101, Finding XIII). Before completion by surrender, the fraud and error were discovered and the checks were returned to defendant (Finding XVI, R. 103). Nor were the 4 checks ever surrendered to United Produce (R. 91).

⁵⁴In California mistake need not be mutual (p. 66, *supra*).

also a cash letter case and a clearing house case.⁵⁵

Similarly in *Spokane & Eastern Trust Co. v. Huff*, 63 Wash. 225, 115 Pac. 80, the court noted (p. 82) that the "holder of the checks in no way contributed to the mistake" and said that protection was given "to a bona fide holder, who is without notice of any infirmity."

First National Bank v. Noble, 168 Pac.2d 354, 179 Ore. 26, dealt with the right of a bank to recover cash paid a bona fide holder (p. 366) and held that the right would exist if there was fraud (p. 370, 2d col.).

D. DEFENDANT'S CITATIONS ARE IRRELEVANT FOR STILL OTHER REASONS.

To avoid lengthening this brief further, we summarily note that defendant's citations are inapplicable for a variety of other reasons.

In a number of them the question was not whether checks had been collected, but pertained to the rights of the parties in view of insolvencies and the like, in cases where collection was admittedly made and fraud was absent.⁵⁶

A number of the citations rest on basic rules contrary to the law of California and Illinois. For example, federal courts formerly ignored state law and applied their own views as "federal rules". *Erie Railroad Co. v. Tompkins*, 304 U. S. 64, ended this situation in the field of bank collections as well as elsewhere, as stated in

⁵⁵The court cites two across-the-counter cases, *National Bank v. Burkhardt*, 100 U.S. 686, and *American National Bank v. Miller*, 229 U.S. 517. In each, the holder in due course was a depositor of the bank on which the check was drawn and deposited the check to its credit there. In the *Burkhardt* case (at p. 689) the court makes a statement almost identical with that quoted at p. 95, *supra*, from the *Gregg* case. In the *Miller* case (p. 520) the court notes that the rule of which it speaks applies only "in the absence of fraud."

⁵⁶*Hekler v. Ward*, 21 F. Supp. 710; *People v. Sheridan Trust and Savings Bank*, *supra*; *First National Bank of Richmond v. Davis*, 114 N.C. 343, 19 S.E. 280; *Storing v. First National Bank of Minneapolis*, 28 F.2d 587, and *Rickey v. New York State Nat. Bank*, 7 F. Supp. 29.

First Federal Trust & Savings Bank v. Kent, 119 F.2d 151, 155 (6 Cir.). All the federal cases cited by defendant are pre-*Erie* cases. *Security National Bank of Sioux City v. Old National Bank*, 241 Fed. 1, explicitly recognized that it was opposed to a large body of decisions in many jurisdictions, *including California* (citing *Steinhart v. National Bank*, 94 Cal. 362, 29 Pac. 717, discussed at p. 47, *supra*), but it felt free to ignore the state law (p. 7). No such freedom now exists.

Some of defendant's citations come from jurisdictions resting on the "New York rule", which both California and Illinois reject (see pp. 37, 38, *supra*). These cases are not in point because they go on the premise that the collecting bank acts as the agent of the forwarding bank and thus owes a duty to it and that the payee can look only to the forwarding bank.⁵⁷

VI.

Discussion of Defendant's Affirmative Claims That Plaintiff Was Negligent, That It Made Misrepresentations, and That It Has Received a Benefit from Defendant.

A. THE QUESTION WHETHER PLAINTIFF WAS NEGLIGENT IS A FALSE ELEMENT IN THE CASE.

Defendant devotes much space to the contention that plaintiff was negligent (Br. 72-108). This contention, we have seen, can be treated only as a counterclaim, not as a defense (p. 35, *supra*). The alleged negligence is that plaintiff failed to discover that United Produce was kiting checks. This is the same as saying that plaintiff negligently failed to discover that it was being defrauded by United Produce. And, says defendant it, too, suffered loss from the kite.

Plaintiff's alleged negligence is a false element in the case, an attempt to befog the issues.

⁵⁷E.g., *Hekler v. Ward*, *supra*; *First National Bank of Richmond v. Davis*, *supra*; *Storing v. First National Bank*, *supra*, and others.

1. The Claim of Negligence Is a False Element Because No Negligence, if any, of Plaintiff Had any Causal Relationship to Defendant's Loss.

Proximate cause is necessary before one may hold another responsible because of negligence for loss or damage. And where one's own negligence is the proximate cause, it cannot reimburse itself from another (cf. 19 Cal. Jur. 641-642). As an example, note *Oakland Bank of Savings v. Murfey*, 68 Cal. 455, 9 Pac. 843. There a stranger walked into the office of a notary public and signed a deed, falsely purporting to be the grantor, and the notary acknowledged his signature as that of the grantor. The stranger then went to the plaintiff bank and, representing himself to be the grantee, borrowed money on the security of the deed. The bank later sued the notary for negligence. It was held, not merely that the plaintiff bank was itself negligent, but that its negligence in lending to a stranger was the proximate and sole cause of the loss. And cf. *Edelen v. Oakland Bank of Savings*, 39 Cal. App. 302, 178 Pac. 737.

Here there was no proximate cause between any act or omission of the plaintiff and any loss sustained by defendant. Defendant's loss was caused by its own negligence.

The Findings.

Not only do the detailed facts found so established (pp. 10, 11, 18, 25, supra), but the court specifically found that the loss sustained by defendant in honoring checks on the "Lofendo" account was

"in no way connected with the 6 checks for \$113,216.50 or anything that had occurred with respect to those 6 checks either at the defendant's offices or at the plaintiff's offices or with anything that had been done relative thereto by the plaintiff or the defendant; that the loss was the sole and proximate result of defendant's own carelessness and negligence, as aforesaid." (Finding XXIII, R. 107)

It further found (Finding XXIX, R. 112):

"that it is not true that any act of plaintiff in allowing United Produce Company to incur obligations of any kind to it or

anything else ever done or omitted by plaintiff in any way proximately caused or contributed to any loss sustained by the defendant in any amount whatever;"

The Evidence Compelled the Findings.

Mr. Tarr, an officer of defendant's branch, was in charge of the Lofendo account. In October, 1948, he was on vacation, and Cosgrove, another officer, relieved him. Cosgrove became interested in the large number of large checks passing between "Lofendo" and United Produce, in both directions, and he felt that the matter required investigation. On Tarr's return the subject was discussed at an officers' meeting (R. 434-436). The testimony of the manager, Estribou, shows that he suspected that a check kite was going on (R. 364, 365). He thereupon gave instructions that his bank must no longer accept United Produce's checks for immediate credit until such time as "Lofendo" "can be contacted and his method of operation discussed." Tarr then prepared a memorandum epitomizing the "unusual operations between" Lofendo and United Produce and stating Estribou's instructions. The memorandum, dated October 22nd, was initialled by all the officers (P. Ex. 12, R. 1174B).

Word was sent to Lofendo to call and explain. About a week later Lofendo and Rosenthal, Secretary-Treasurer of United Produce, called and gave an explanation that satisfied Cosgrove. But Rosenthal was to confirm the explanation by letter. The letter never arrived,⁵⁸ and on November 10th Cosgrove's "confidence" in the explanation and in "Lofendo" and United Produce "was shaken" and he "no longer had that confidence" (R. 436-439). He so informed Estribou (R. 439), and Estribou concluded that what was going on between Lofendo and United Produce was not honest (R. 370, 372). Consequently, on November 10th Estribou gave insistent instructions that no checks presented for

⁵⁸Rosenthal was probably afraid of a mail fraud charge if he wrote a letter.

deposit on the Lofendo account were to receive credit. They were to be accepted for collection only and credit was to be given only when collection was complete and the funds in hand (P. Ex. 13, R. 1174C).

The minutes of an officers' meeting of November 10th show (R. 368):

"The matter of Frank C. Lofendo and United Produce Company was rediscussed. Mr. Estribou *insisted* that all items for deposit should be cleared before credit is received."

Defendant admits that its manager, Estribou, did become convinced of "Lofendo"-United's dishonesty, but it argues that this did not occur until three days later, November 13th (Br. pp. 99-100). Yet its brief quotes Estribou's testimony, under examination by adverse counsel, that his "state of mind about the unethical quality of the transactions between Lofendo and United Produce was just the same on the 10th as it was three days later," namely, that he was "almost positive that something was going on that was not ethical between Lofendo and United Produce Company" (Br. p. 100).

Defendant quotes other testimony on subsequent examination by Estribou's own counsel (Br. 101). But if there are inconsistencies, the trial court resolved them against defendant (Finding XX, R. 105).⁵⁹

Patently, no negligence, if any, of plaintiff prior to October 22nd or November 10th caused any loss to defendant. On November 10, 1948, *defendant had not yet suffered any loss*. The Lofendo account still had a clear collected balance (R. 1181, 1259).⁶⁰ Defendant sustained no loss until it paid checks of

⁵⁹Estribou was an evasive witness, even on questions by the court, e.g., R. 430-432. The trial court was warranted in arriving at a low estimate of the witness' credibility.

⁶⁰The same was true on October 22nd when instructions were first laid down (R. 562).

Lofendo on November 16th (pp. 53, 54, *supra*). The loss occurred because defendant ignored and violated its own insistent instructions that Lofendo checks were not to be honored against uncollected United Produce checks. The trial court found (R. 107) "that the loss was the sole and proximate result of defendant's own carelessness and negligence."⁶¹

Defendant argues (Br. 89-90) that it "was not negligent in not having discovered the kite" and asserts (p. 9) that the court found that it was. But defendant *did in fact on November 10th and thereafter believe and conclude that there was a kite or at least that there was dishonest activity* going on between "Lofendo" and United Produce. It is pointless to argue that if it had not so concluded, it would not have been negligent. The trial court did not find defendant negligent for failing to discover the kite; it found it negligent for honoring checks in the teeth of its belief that there was a kite.

2. The Claim of Negligence Is a False Element Because Defendant Is Precluded from Recovering on Its Counterclaim by Reason of Its Own Negligence.

As we have seen (p. 35, *supra*), defendant's claim of plaintiff's negligence stands on the same footing as if there had been no 6 checks for \$113,216.50 or 4 checks for \$89,813.10 and no

⁶¹The grossness of the negligence is shown by stipulated facts (R. 1181). The instructions were given November 10th. The first checks to arrive thereafter, drawn on the account, were rejected for lack of funds, on November 12th. The first checks to arrive for deposit, on November 13th, were taken for collection only. The same is true of the next group, November 15th. But on the same day—November 15th—another group, for \$97,207, arrived, and immediate credit was given. As defendant's manager Estribou testified, "somebody overlooked their hand * * * didn't follow my instructions" (R. 375). The next day defendant honored and paid checks for \$109,000. Concurrently, defendant mishandled checks for \$75,000 drawn on the account which arrived on November 15th, by "reason of oversight of employees of defendant" (R. 1183).

suit by plaintiff, and as if defendant had sued plaintiff. Defendant's claim is based on negligence. Its own, even if not the sole cause, was certainly contributory negligence, and contributory negligence is a complete bar.

Defendant tries to apply this principle upside down, to defeat recovery by plaintiff. This argument proceeds on the false assumption, already noted, that plaintiff is suing to recover a loss (see discussion at p. 27, *supra*).

Plaintiff is suing to recover the balance owed it by defendant as a debtor. Its suit is based on contract, not on negligence of defendant. Negligence is brought into the case, not by plaintiff, but by defendant as the basis of a counterclaim. To any such claim, defendant's own negligence is a bar.

As part of the same upside down argument, defendant invokes the maxim that where one of two innocent parties must suffer by the act of a third, he by whose negligence it happened must be the sufferer (Br. 105-106). That maxim, if applicable at all, defeats defendant's counterclaim; for the only "loss" involved in the case is defendant's loss arising from honoring "Lofendo" checks in violation of its own instructions (see p. 27, *supra*).

3. The Claim of Negligence Is a False Element Because Plaintiff Owed No Duty to Defendant in the Premises.

"Negligence in the air" is not actionable. *The Chester Valley*, 110 F.2d 592, 594 (5 Cir.). And "a bank does not owe a general duty to the public at large to transact its business in a non-negligent manner." 8 *Zollman on Banks and Banking*, p. 255.

As stated in *Routh v. Quinn*, 20 Cal.2d 488, 491, 127 Pac.2d 1:

"It is an elementary principle that an indispensable factor to liability founded on negligence is the existence of a duty of care owed by the alleged wrongdoer to the person injured or to a class of which he is a member."

In *Buckley v. Gray*, 110 Cal. 339,⁶² the court said:

"there must exist between the party inflicting the injury and the one injured some privity by contract or otherwise, by reason of which the former owes some legal duty to the latter * * *." (p. 343)

In *Savings Bank v. Ward*, 100 U.S. 195 (quoted in *Buckley v. Gray*) an examiner of titles was employed by an owner of property. Relying on his certificate of title, the bank lent the owner money on the security of the property. The title proving bad, the bank sued the examiner for negligence. In holding for the defendant the court said (p. 202):

"Analogous cases * * * show to a demonstration that * * * the person occasioning the loss must owe a duty, arising from contract or otherwise, to the person sustaining such loss. Such a restriction on the right to sue for a want of care in the exercise of employments or the transaction of business is plainly necessary to restrain the remedy from being pushed to an impracticable extreme. There would be no bounds to actions and litigious intricacies if the ill effects of the negligence of men may be followed down the chain of results to the final effect."

In *Union Old Lowell National Bank v. Paine*, 61 N.E.2d 666, 318 Mass. 313 (1945), and *Cohen v. Tradesmen's National Bank*, 105 Atl. 43, 262 Pa. 76, recovery against banks was denied on this principle. In the *Paine* case a bank officer pledged bonds of bank customers for a personal margin account with defendant, a broker. The bank sued the broker, and the latter

⁶²In both cases cited above demurrers were sustained to a complaint. In *Routh v. Quinn*, a purchaser at a tax sale was denied recovery against the assessor for negligent computation of the tax, it being held that the duty of correct computation was not owed to the purchaser. In *Buckley v. Gray*, plaintiff was denied recovery against the attorney who drew his mother's will for so negligently drawing it as to leave a share to others contrary to the mother's direction and in having the plaintiff witness the will so as to render him incapable of taking under it.

defended on the ground that the bank was negligent in not discovering its officer's scheme. The court held the bank owed the broker no duty in the premise. "At the most," it said, "these contentions mean that the bank was negligent towards customers."

In the *Cohen* case plaintiff gave his check to one who deposited it with his banker, who in turn sent it to defendant bank for collection. Defendant presented it to the wrong bank where it was marked "W.B." meaning "Wrong Bank" and returned. Defendant then misread "W.B." for "N.F." meaning "No Funds" and returned the check with an endorsement of "Not Sufficient Funds". Charging negligence, plaintiff sued defendant for damage to his credit, business and reputation. The court held that defendant owed no duty to the plaintiff. It rejected the contention that "The nature of a bank's business is such that it 'owes a general duty to all the public not to be guilty of negligence' in the transaction of its business."⁶³

Assuming that plaintiff's officers were negligent in not discovering earlier that United Produce was swindling it, the duty of care owed by them was to their own bank, not to defendant.

The kite could not continue unless defendant honored checks against uncollected funds. The fact that plaintiff for a period of time honored checks of United was no reason why the defendant should honor checks of "Lofendo." Had it declined to honor "Lofendo" checks, it would have suffered no loss.

Defendant cites no authority to show that plaintiff bank owed defendant bank any duty in the premises. The only case it cites (Br. 104) is *Citizens State Bank v. Western Union*, 172 F.2d 950. There a bank claimed that its own customer, Western Union, was liable to it on an overdraft in the customer's account. The customer sued for a declaratory judgment that it was not. The over-

⁶³See also *Crab Orchard Improvement Co. v. Chesapeake & O. Ry. Co.*, 33 F. Supp. 580, 583; *Shelaeff v. Groves*, 27 F. Supp. 1018 (N.D. Cal.); *Western Auto Supply v. Phelan*, 104 F.2d 85 (9 Cir.).

draft resulted from a fraudulent check kite conducted by Western Union's manager and a confederate, and the bank was negligent in permitting it to occur. The bank owed a duty to Western Union because Western Union was its customer. There was a privity between them. The question was whether the bank could impose on its customer a loss resulting from the bank's own negligence in honoring checks.

If plaintiff owed defendant a duty to discover and stop the kite, defendant owed plaintiff a like duty. Defendant complains that plaintiff failed to discover the kite. But defendant *did* discover it. On November 10th defendant did in fact conclude that there was a kite—something dishonest, going on between "Lo-fendo" and United Produce. Yet defendant permitted the kite to continue, thereby suffered its own losses, and it did not notify plaintiff (R. 373, 374). If one bank owed a duty to another, then the defendant would be liable to the plaintiff, not merely in contract for the deposit account, but in tort for the \$500,000 of losses which plaintiff itself sustained from the check kiting.

4. Answer to the Argument That No Finding Was Made on the Allegation That Plaintiff Was Negligent.

Defendant's discussion of the claim that plaintiff was negligent (Br. 72-89) is both inadequate and inaccurate. But, since the issue is irrelevant for the reasons just discussed, we need not discuss the evidence.

A court need not make a finding on irrelevant matters. *Oedeker v. Muncie Gear Works, Inc.*, 179 F.2d 821 (7 Cir.); 5 *Moore's Federal Practice* (2d ed.) pp. 2659-2661. Nor need it assert the negative of each rejected contention as well as the affirmative of those it finds to be correct. *Schilling v. Schwitzer Cummins*, 142 F.2d 82, 84 (D.C. Cir.).

Defendant argues (p. 107) that a finding was necessary because all those participating in a fraud are liable for the damages suffered by the injured party! Doubtless every conspirator in a

fraud is liable.⁶⁴ But defendant's pleadings made no such absurd charge that plaintiff conspired with United Produce to defraud defendant. They did allege that plaintiff was negligent. But "there is a vast distinction" between negligence and fraud. Fraud is a malfeasance and requires wilful intent to injure, a desire to cheat, another. Negligence, whatever its degree, does not include purpose to do a wrongful act. *Podlasky v. Price*, 87 C.A.2d 151, 161, 196 Pac.2d 608; *Greeley National Bank v. Wolf*, 4 F.2d 67 (8 Cir.). Fraud must be pleaded with particularity, R.C.P. Rule 9b, and a finding of fraud cannot be based on conjecture or surmise. There is no evidence that could sustain such a finding here. *Podlasky v. Price*, supra, at 161.

There is not a scrap of evidence to support a claim that plaintiff was a co-conspirator with United. Nor does defendant contend so.⁶⁵

Furthermore, whenever from facts found other facts are inferable which will support a judgment, the inference must be drawn. *Triangle Conduit & Cable Co. v. F. T. C.*, 168 F.2d 175, 179, aff'd 336 U.S. 956. Here the negative of any possible charge that plaintiff was guilty of fraud is implicit in the finding "that it is not true that * * * anything * * * done or omitted by plaintiff in any way proximately caused or contributed to any loss sustained by defendant in any amount whatever" (R. 112).

So also the negative of knowledge by plaintiff of the fraud is implicit in the finding that it "was deceived and misled by reason of the facts found * * * and the fraud perpetrated" (Finding XIII, R. 101).

⁶⁴This, of course, is all that defendant's citations hold, e.g., *State v. Day*, 76 C.A.2d 536, 550, 173 Pac.2d 399.

⁶⁵Typical of what it does contend is the assertion that "it must be inferred * * * that Merchandise had knowledge. If it did not actually know about them, it should have known of them" (Br. 88). Fraud may not be inferred, *Podlasky v. Price*, and a charge that one "should have knowledge" is no more than a charge of negligence.

B. ANSWER TO THE CONTENTION THAT DEFENDANT'S LOSS WAS CAUSED BY REPRESENTATIONS OF PLAINTIFF.

Another preposterous counterclaim is that plaintiff induced defendant by false representations to honor "Lofendo's" checks (Br. 89, et seq.). The contention is based on a wire of October 20, 1948 from plaintiff to defendant, not volunteered but sent in response to an inquiry, which defendant's brief partially quotes (p. 93).

There was nothing false or misleading in the wire. But we do not pause to consider that subject, since the counterclaim fails for at least three elementary reasons:

(a) No claim may be predicated on fraud unless there has been reliance and resulting loss. *Carlson v. Murphy*, 8 C.A.2d 607, 610, 47 P.2d 1100; *Podlasky v. Price*, 87 C.A.2d 151 at 158, 196 Pac.2d 608; *Cal. Civ. Code*, Sec. 1709.

(b) There must have been a right to rely; and

(c) The alleged misrepresentation must have been made for the purpose of inducing action. *Cal. Civ. Code*, Sec. 1709. The intention to induce the very action which causes the loss is vital to the claim. *Carlson v. Murphy*, supra.⁶⁶

Finding.

On each of these matters there is a finding against defendant. The trial court found (Finding XXIX, R. 113):

"that it is not true that the plaintiff ever made any representation to the defendant to induce it to pay any check or checks drawn on the 'Lofendo account' to the order of United Produce Company or to induce the defendant to give anyone whatsoever credit for any check or checks drawn by United Produce on the plaintiff payable to 'Lofendo' or to anyone else; that it is not true that, in reliance on any representation of the plaintiff, defendant ever paid any

⁶⁶Cal. C.C., Sec. 1709 prescribes: "One who wilfully deceives another with intent to induce him to alter his position to his injury or risk is liable for any damage which he thereby suffers."

checks drawn on the 'Lofendo account' or ever gave the 'Lofendo account' credit for checks of United Produce Company."

The Evidence Compelled the Finding.

Defendant received the wire on October 20, 1948, and its branch manager, Estribou, saw it at once (R. 394). But two days *later*, on October 22nd, he laid down his instructions that no credit was to be given the "Lofendo" account on the basis of any United Produce checks before collection, until after a satisfactory explanation could be obtained from "Lofendo" (P. Ex. 12, R. 1174B). Patently, the wire did not persuade Estribou to honor checks.

A few days later Lofendo and Rosenthal of United Produce called on defendant. It was the explanation which *they* then gave, not the wire, upon which defendant relied (R. 439, 419).⁶⁷ Accordingly it relaxed its refusal to give credit on United Produce checks.

But the reliance on the explanation vanished when United Produce failed to confirm it by letter. United's failure to keep its promise convinced defendant that what was going on between United Produce and Lofendo was dishonest. Consequently, on November 10th, defendant laid down express instructions that no credit was to be given the "Lofendo" account on the faith of United Produce checks until the funds were actually collected and in hand (p. 102, *supra*).

At that time, November 10th, defendant had yet sustained no loss (pp. 102, 103, *supra*). Even if it had theretofore relied on the wire, it had sustained no loss by reason of any such reliance.

⁶⁷Estribou testified that the report of Rosenthal's explanation had "some effect" to "allay [his] apprehension about United Produce Company checks" and that he "relied upon the report that Mr. Cosgrove made of the explanation given to [Estribou] by Rosenthal and Lofendo" (R. 419).

After November 10th it did not honor checks in reliance on the wire but solely because on November 16th its employees violated instructions not to honor checks at all.

The wire of October 20th was not volunteered. It was a reply to an inquiry and sent as a courtesy (R. 1271), not to induce defendant to do anything whatever. Plaintiff did not send it to induce defendant to give "Lofendo" credit on United Produce checks, because the wire expressly says: "Impossible for us to set limit on acceptance of their [United Produce] checks" (R. 1271). Defendant understood from this caveat that plaintiff "was saying they could make no suggestion then as to whether [defendant] were safe in giving credit on the United Produce Company's checks in any amount" (R. 413, 414).

This sentence was in legal effect a warning not to rely, *Podlasky v. Price*, supra, at 159, and defendant so regarded it. Defendant deemed it so significant that it is *repeated* in defendant's memorandum of October 22nd which recites Estribou's instructions not to give credit until collection (R. 1174B). The effect of the wire was not to seduce defendant but to alert it, as Mr. LeRoy's testimony shows.⁶⁸

Defendant also refers (Br. 93) to a letter written by plaintiff to defendant's Fresno branch September 22nd, because the wire "suggest[ed] you contact your main branch at Fresno who have complete information."

The letter bore the notation, "For your private use, and without responsibility on the part of this bank or its officers" (R. 1273). As shown in *Podlasky v. Price*, supra, at 160, "the office of such

⁶⁸Defendant told Mr. LeRoy on November 18th "that fortunately they [the branch] had been alerted to the situation and were only paying against collected funds, and consequently they were all right," that they had been "alerted through some communications from the Merchandise National Bank of Chicago" (R. 457).

This communication is the wire, for nothing else is disclosed in the record. Estribou's actions, after receipt of the wire, show that its effect was to alert him.

language was to emphasize that [the parties making the statements] did not pledge their faith to the statements * * *."

And defendant no more relied on the letter than it did on the wire. It was *after* learning its contents by telephone call to the Fresno branch that Estribou gave his instructions of October 22nd. He regarded the letter as saying no more than the wire. The memorandum of October 22nd so recites, for it says (R. 1174B), "Mr. Nelson of the Fresno main office has been contacted and the information that he gave us was no more than what was contained in our wire response."⁶⁹

C. ANSWER TO THE CONTENTION THAT PLAINTIFF RECEIVED A BENEFIT AND THEREFORE MAY NOT RECOVER.

Defendant presents another argument, quite amorphous (Br. 54-56). Its caption asserts that plaintiff "cannot recover from [defendant] its payment of the four and six checks because it received a substantial benefit from their payment."

Once again, it is necessary to recall the *facts of this case*: defendant never paid a cent on, because of, or in reliance on the 6 checks or the 4 checks, or made any payment in any way connected with them.

Defendant argues (Br. 54) that it honored \$75,586.86 of checks drawn on the Lofendo account, of which some \$51,000 were payable to United Produce and had been endorsed by

⁶⁹Nothing in the letter was false. Defendant (Br. 94) points to the statement that United was maintaining balances averaging 5-figure proportions, and asserts that there were "noon-day overdrafts." But a "noon-day overdraft" is mere bookkeeping, resulting from the practice of pre-posting, and has no relation to a true balance; the true balance is always greater than the noon-day balance (R. 406; Stipulated, R. 962; cf. R. 1274).

Defendant also points to the statement that United was making proper use of its line of credit, that it was making progress from the standpoint of operations, and that plaintiff entertained favorable regard for the account. This was merely an expression of opinion, as the letter itself indicates by adding, "which is best evidenced by the support we extend." See *Park & Tilford Import Corporation v. Passaic National Bank & Trust Co.*, 30 A.2d 24 (N.J.), a case directly in point.

United Produce to the plaintiff. It then states that the \$75,586.86 had been "charged against the credit for the four checks of \$89,813.10".

But defendant honored the \$75,586.86 before the advice of credit for \$89,813.10 was received and not in reliance thereon (see p. 18, *supra*). Later it tried to take fortuitous advantage of that advice of credit. To say that plaintiff "got the benefit" of the attempted charge of the overdraft against the \$89,813.10 is to treat facts lightly.

Similarly defendant states that it honored \$109,000 of Lofendo checks in the belief that \$97,000 of checks for which it had given credit were good, and it complains that the \$97,000 of checks later turned out to be bad when presented to the bank on which they were drawn, the plaintiff. But no act of plaintiff had induced defendant to pay the \$109,000. And plaintiff was under no duty to honor \$97,000 of checks, when there were no funds. Defendant is not so bold as to make the claim openly. But it does so in substance, for it concludes that plaintiff was obliged to let the defendant later seize the advice of credit for the \$113,216.50 to make itself whole for its prior loss.

The essence of defendant's argument is that the checks for \$109,000 and some \$51,000 of the checks for \$75,586.86 were payable to United Produce and had been endorsed by the payee and delivered to plaintiff in payment of debts of United Produce to it (Br. 40, 41, 55). Assuming this to be the fact, it is irrelevant.

Defendant's own statement of the matter shows that, if plaintiff got the checks, it obtained them for value on November 6, 8 and 9, i.e., before notice of any fraud.

Any Lofendo checks received by plaintiff from United Produce were immediately credited against current indebtedness (R. 504, 1280). Moreover, under its agreement with United, plaintiff took all such checks as security for old indebtedness (see Appendix to this brief, pp. 2, 3). Even in the absence of that agreement it

would have had a banker's lien on them as security.⁷⁰ Plaintiff therefore took the checks as a holder in due course, an innocent purchaser for value, whether regarded as taking them in payment of the past debt,⁷¹ or as security, either under express agreement or by banker's lien.⁷²

Defendant so admits (Br. 55, 56) but tries to evade its effect by saying that plaintiff is not suing on the checks. The point, of course, is that a bank (here defendant) may not recover from a recipient (plaintiff) a payment made on a check drawn upon it if the recipient was a holder in due course or a bona fide purchaser for value or had acted in reliance on the check or on the payment, or had applied it before notice on debts due it. *Weiner v. Roof*, 19 Cal.2d 748 and various cases cited by defendant itself so show (see pp. 41, 96-98, *supra*).

In addition, as a result of receiving these checks, plaintiff was induced to enter new credits, on the day of receipt, in an equal or greater amount on United's commercial ledger sheet, and these credits were immediately checked against (e.g., R. 763, 928, 1276, D. Ex. PP under dates of November 6, 1948, et seq.). Thus every element necessary for a bank's protection, but lacking as respects defendant's interest in the 6 checks and the 4 checks, is present as respects plaintiff's interest in any checks drawn on the Lofendo account and received by plaintiff from United Produce.

Yet, because plaintiff has the right to be protected and defendant lacks any such right, defendant asks the Court to strip the plaintiff of protection for defendant's benefit.

⁷⁰*Goggin v. Bank of America*, 183 F.2d 322 (9 Cir.).

⁷¹N.I.L. Sections 25, 52; *Cal. Civil Code*, Sections 3106, 3133; *Smith-Hurd Illinois Statutes*, Ch. 98, Sections 45, 72.

⁷²N.I.L. Section 27; *Cal. Civil Code*, Sec. 3108; *Smith-Hurd*, Section 47; *Adolph Ramish Inc. v. Woodruff*, 2 Cal.2d 190, 203, 40 Pac.2d 509; *Elgin National Bank v. Goecke*, 129 N.E. 149, 295 Ill. 403.

The situation sums up to this:

- (a) The checks for \$109,000 and \$51,000 were unconnected with the 4 checks for \$89,813.10 or the 6 checks for \$113,216.50 and were not paid in reliance thereon. Therefore, defendant has no claim against plaintiff predicated on estoppel or change of position (p. 30, *supra*).
- (b) No other action or omission of the plaintiff had a causal relation to the payment of the checks for \$109,000 and \$51,000. Therefore there can be no recovery on the counterclaims (pp. 100-103, 109-112, *supra*).
- (c) Nor can defendant recover payments made on the ground of mistake since plaintiff was a holder in due course.

Ever since March, 1948, checks had been going back and forth between Chicago and Bakersfield. Each one was a separate matter. Plaintiff held over \$500,000 of checks drawn by Lofendo which it had received after November 4th and which defendant refused to honor (pp. 6, 22, *supra*). Yet during the same period of time, the plaintiff honored and paid checks of over \$800,000 to "Lofendo" of which defendant received the benefit.⁷³

On defendant's argument, its receipt of the \$800,000 from plaintiff would have deprived it of the right to reject the \$500,000 of checks, and plaintiff would now be entitled to recover that sum *in addition* to the amounts for which it has been given judgment.

If it were permissible to go behind the 6 checks or the 4 checks to other checks, then with like reason the case would be opened up as to every check passing back and forth from the beginning of the Lofendo account in March 1948 (R. 93). And no matter how far back the effort were to go in reopening closed transactions,

⁷³This fact may be perceived by inspecting Def. Ex. PP, explained at R. 754-757, and P. Ex. 29, explained at R. 747, 1227-1230. Printing of these exhibits was omitted by court order.

the end result would be that plaintiff paid to defendant vastly more than it received.

VII.

Answer to Brief of Appellant Eugene J. O'Riley

Appellant O'Riley is trustee in bankruptcy of United Produce. He was brought into the case by defendant's interpleader counterclaim over a certain \$30,000, which would be the balance of the \$113,216.50 taken out of plaintiff's account if defendant should prevail (Brief of Bank of America, pp. 1, 2).

The gist of his appeal is that if the judgment between the two banks should be reversed "the trial court should then be required to hear the respective claims of Merchandise and the Trustee" to the \$30,000 (O'Riley, Br. 4).

But nothing remains to be tried between O'Riley and the plaintiff, no matter what happens to Bank of America's appeal. He was a party to the trial (R. 171), is bound by the findings and assails none of them. The findings show that "Lofendo" and United Produce are one and the same, that United Produce worked a fraud on plaintiff, and that the 6 checks were drawn as part of that fraud. The essence of Bank of America's argument is that for one reason or another it has greater rights than "Lofendo". But no one has ever pointed to any basis on which United Produce could have any rights at all against plaintiff (see discussion, pp. 41-49, *supra*).

The trial court stated in its Conclusion No. XI that O'Riley's claim should be dismissed because there was no fund to litigate in view of the judgment in the main case (R. 115). But if Conclusion XI had been omitted, the findings would still support the judgment dismissing O'Riley's claim (R. 117, 118). An appellate court must affirm when the facts found require, regardless of the theory upon which the trial court may have acted. *Helvering v. Gowran*, 302 U. S. 238, 245; *Utah Copper Co. v. Railroad Retirement Board*, 129 F.2d 358, 362.

CONCLUSION

We respectfully submit that the judgment is right, and that it should be affirmed.

Dated: San Francisco, January 23, 1952.

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(Appendix follows)

APPENDIX

(Supplementing Discussion at Pages 49, 50 of This Brief)

1. United Produce Had but One Account with Plaintiff.

Although there were several ledger sheets for United Produce in plaintiff's books, there was but one account. No one of the sheets by itself showed what, if any, actual credit balance United Produce had. No sheet is fully understandable by itself. The credits on the commercial ledger sheets came from a "Drafts Discount Ledger Sheet" and a "Notes Liability Ledger Sheet" (Stipulation, R. 1276). The latter by itself was an incomplete record, requiring consultation with an Assigned Accounts Ledger sheet.¹ This in turn is incomplete for it fails to show what payments had been made. It merely lists the face amount of checks endorsed and remitted to plaintiff by United Produce, whether or not they had yet been collected (R. 1280), but it does not record whether the checks were collected or in fact paid. Whenever such checks were returned unpaid, the practice was to make the charge-back, not on this sheet, *but on the commercial ledger sheet*. Similarly, if discounted drafts were returned unpaid, the charge-back was then made on the commercial ledger sheet. This was plaintiff's practice not only with respect to United Produce but with respect to all customers conducting similar operations (R. 1282).

2. The Contractual Arrangement Between Plaintiff and United Produce.

As found (p. 49, *supra*), United Produce's account with plaintiff was maintained under several writings which together constituted an agreement defining the terms of their relationship.

¹As stipulated (R. 1280), "Nothing on the Notes Liability Ledger sheet reveals or reflects the unpaid balance of United Produce Company's notes held by plaintiff at any time; but in order to ascertain that balance so far as it is shown by any ledger sheet, recourse must be had to United Produce Company's 'Assigned Accounts Ledger' sheet on plaintiff's books."

The first of these writings was the signature card. Thereby United bound itself to all agreements recited in the deposit book (R. 239). That book contained an agreement governing "receiving and handling items for deposit and collection." It provided that, "All items are credited * * * subject to final payment in cash or solvent credits," and that the plaintiff "may charge back any item at any time before final payment, whether returned or not * * *." It further provided that plaintiff "may decline to honor or pay checks drawn against conditional credits" (P. Ex. 7, R. 1169).

In the appendix to its brief defendant argues that this agreement is part of the deposit tag and that deposit tags were not involved in the transactions between United and the plaintiff. Physically, the particular piece of paper marked as the exhibit happens to be the reverse side of a deposit tag. But it was first established that the same agreement appeared in the deposit book (R. 240), no copy of the book being available.

The form of "assignment" of accounts receivable, pursuant to which the checks of its alleged debtors were remitted by United Produce to the plaintiff (P. Ex. 6, R. 1168) contains United Produce's agreement

"(5) To endorse *for collection* by the BANK forthwith, upon their receipt, all checks * * * received by the undersigned whether in full or partial payment of any indebtedness * * * assigned hereunder."

In the handling of these items for collection, the rights of the parties were governed by the basic agreement in the deposit book.

The assignment also authorized plaintiff "in its discretion and without notice to" United

"(11) even though the then indebtedness, liability or obligation of the undersigned to the BANK be otherwise not due, to charge the undersigned's account with the BANK with all sums not paid by debtors on the due

dates in said schedule specified and with the full amount of any assigned indebtedness as to which * * * any dispute or defense arises."

The form of promissory notes given by United Produce to plaintiff provided (P. Ex. 5, R. 1163) that

"To secure the payment of this note, *and of any and all other indebtedness, obligation or liability* of the undersigned to the holder hereof due or to become due, whether direct or indirect, absolute or contingent * * * and whether heretofore or hereafter contracted or existing and wheresoever and howsoever acquired by said holder or created, arising or evidenced" United Produce pledged and assigned all accounts receivable "together with any and all other property of the undersigned, or any of them, of every kind and description now or hereafter and howsoever in the possession or control of, or in transit to or from said holder hereof."

It further provided (R. 1163):

"that upon breach of any of the promises herein contained, or upon failure to pay any of said other indebtednesses, liabilities or obligations when due, or in the event that said collateral shall depreciate in value in the opinion of the holder hereof so that it becomes inadequate security, *or if said holder shall feel unsafe or insecure for any reason whatsoever*, said holder may thereupon, or at any time or times thereafter," do a number of things, including the following:

"At any time, whether in case of the insolvency of the undersigned or otherwise, and without notice or demand of any kind, any indebtedness owing by the said holder hereof [the Bank] to any or all of the undersigned [United Produce] * * * of whatsoever kind or description, may be by said holder appropriated and applied hereon, or on any other indebtedness, liability or obligation owing the holder, direct or indirect, absolute or contingent, as well before as after the maturity hereof or thereof."

No. 13,039

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Appellants,

vs.

MERCHANDISE NATIONAL BANK OF CHI-
CAGO, a national banking association,

Appellee.

REPLY BRIEF FOR APPELLANTS.

FILED

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Subject Index

	Page
I. A brief statement of the basic facts.....	1
II. Merchandise's contention that the checks were not paid when charged against United's account is erroneous	4
1. The checks were paid by virtue of section 207(a) of the Illinois Revised Statutes.....	4
2. Merchandise's efforts to distinguish Bank of America's authorities are futile.....	8
3. Merchandise's claim, that the credit balances against which the four and six checks were charged were "apparent" and not good balances is not sound	11
III. Merchandise's contention, that under the collection contract between Lofendo, Bank of America and Merchandise collection and payment were not consummated until Bank of America made book entries on Merchandise's account with it, is erroneous.....	4
1. Statement of this contention by Merchandise.....	14
2. The attempted revocation by Merchandise of the advice of credit for the six checks did not alter the fact that these checks had been collected and paid	15
3. If Merchandise were right in its contentions, the four checks were paid.....	16
4. The California Bank Act does not support Merchandise's contention	17
5. The "contract" between Lofendo and Bank of America as established by the law and banking practice was that Bank of America could accept in payment of checks forwarded for collection credits with Merchandise	22
6. Merchandise upon giving the credit became the owner of the fund.....	24
7. The "contractual arrangement" between Bank of America and Merchandise: Under it the checks were collected and paid when Merchandise gave its credits, regardless of when Bank of America entered these credits on its books.....	25

	Page
8. Merchandise's contention that there was no consideration for a change in relationship raises a false issue	28
9. Merchandise relies on irrelevant matters to establish the contractual arrangement for which it contends	29
(a) The bookkeeping practice of Bank of America, in making charges against Merchandise's account with it, was wholly unrelated to either the time or the fact of payment.....	29
(b) The difference between cash and collection letters does not support Merchandise's contention respecting the contractual arrangement..	31
(c) The record in which Merchandise entered the credits was not at all analogous to a "check stub"; its entry of the credits therein evidenced its giving of the credits.....	32
(d) The acts alleged to constitute "practical construction" of the contractual arrangement were unrelated to any contract.....	33
10. Conclusion respecting the point.....	34
IV. Merchandise's attempt to distinguish Bank of America's cases relating to the point that debtor-creditor relationship between the banks was established when Merchandise gave the credit is futile; and the cases on which it relies respecting the point do not support it	35
V. Merchandise's contention that Bank of America had no right of set off is erroneous.....	41
VI. Merchandise cannot recover from Bank of America its payment of the four and six checks because it received a substantial benefit from their payment.....	46
VII. Bank of America's position was changed by reason of Merchandise's payment of the four checks and therefore it became a bona fide purchaser of their payment	47
VIII. Bank of America's position was changed by reason of Merchandise's payment of the six checks and therefore it became a bona fide purchaser of their payment.....	51
IX. Merchandise is precluded from recovering the payment (1) because it was negligent in making the pay-	

	Page
ments, and (2) because such negligence will cause Bank of America prejudice if Merchandise is allowed to recover	52
1. Merchandise's claim that its negligence is irrelevant because under the law a payor is not precluded by his negligence from recovering a payment made by mistake.....	52
2. Merchandise's contention that its negligence did not cause Bank of America prejudice.....	53
3. Merchandise's claim that Bank of America's contention based on Merchandise's negligence is a counterclaim	54
4. Merchandise's contention that Bank of America was guilty of contributory negligence.....	55
5. Merchandise's contention respecting its wire of October 22nd and letter of September 22nd.....	56
X. The trial court erred in not finding with respect to the issue whether Merchandise was participating in United's fraud	57
XI. The trial court's finding that Bank of America entered into a contract that it would not act upon the advice of credit with respect to the six checks when received is not supported by the evidence, but such agreement, if made, was void and unenforceable.....	58
1. The findings are not supported by the evidence....	58
2. Assuming a contract, it was invalid because not supported by a consideration.....	59
3. Assuming a contract, it was invalid because based on mistake	63
4. Assuming a contract, it was induced by Merchandise's fraud	66
XII. Merchandise's contention, that as United could not compel Merchandise to pay United's checks Bank of America cannot retain them, is entirely irrelevant....	67
XIII. Merchandise's charges against Bank of America are entirely unwarranted and untrue.....	67
XIV. Conclusion	69

Table of Authorities Cited

Cases	Pages
Alberti v. Jubb, 204 Cal. 325, 267 P. 1085.....	66
American Exchange National Bank v. Gregg, 138 Ill. App. 596, 28 N.E. 839	8
Bard v. Kent, 19 Cal. (2d) 449, 122 P. (2d) 8	61
Barnhart Aircraft Inc. v. Preston, 212 Cal. 19, 297 P. 20	33
Bohlig v. First National Bank, 48 N.W. (2d) 445 (Minn.)	9, 10
Cleveland-Cliffs Iron Co. v. East Itasca Mining Co., 146 Fed. 232	65
Commercial National Bank v. Armstrong, 148 U.S. 50, 13 S. Ct. 532	26
Dakin v. Bayly, 290 U.S. 143, 54 S. Ct. 113	23, 40
Davis v. First National Bank of Fresno, 118 Cal. 600, 50 Pac. 666	23
Dean Tobacco Warehouse Co. v. American National Bank, 123 Tenn. 365, 117 S.W. (2d) 746	15
Estate of Barton, 96 Cal. App. (2d) 234, 214 P. (2d) 857	66
Federal Reserve Bank v. Malloy, 264 U.S. 160, 44 S. Ct. 296	23
Fire Insurance Association v. Wickham, 141 U.S. 564, 12 S. Ct. 84	61
First National Bank of Corsicana v. Wm. Cameron & Co., 149 S.W. (2d) 132	38, 39
Friedman v. Irving Trust Company, 300 N.Y.S. 51.....	9, 10
Hallenbeck v. Leimert, 295 U.S. 116, 55 S. Ct. 687.....	8
Hannah v. Steinman, 159 Cal. 142, 112 P. 1094.....	66
Hay v. First National Bank, 224 Ill. App. 286	8
Hayes v. Tootle-Lacy National Bank, 72 Fed. (2d) 429...	9
In re Dutton's Estate, 37 A. 583, 181 Penn. 426	62
Krueger v. First National Bank, 217 Ill. App. 18	40
Lepper v. Ratterree, 98 Cal. App. 245, 276 P. 1037.....	63
Lucke v. First National Bank of Marysville, 193 Cal. 184, 223 P. 547	17, 19, 21, 24

TABLE OF AUTHORITIES CITED

v

	Pages
McGregor v. Millar, 166 Kan. 657, 203 P. (2d) 137	65
Pacific National Agricultural Credit Corporation v. Wilbur, 2 Cal. (2d) 576, 42 Pac. (2d) 314	9, 10
Palace Hardware v. Smith, 134 Cal. 381, 66 P. 474	63
People v. People's Bank of Rockford, 353 Ill. 280, 187 N.E. 522	39
People v. Sheridan Trust and Savings Bank, 358 Ill. 290, 193 N.E. 186	39
Rickey v. New York State National Bank, D.C. N.D. N.Y., 7 F. Supp. 29, 70 F. (2d) 1020	15, 39
Rock Finance Co. v. Central National Bank of Sterling, 339 Ill. App. 319, 89 N.E. (2d) 828	7
Security National Bank v. Old National Bank, 241 Fed. 1	9
Security Trust and Savings Bank v. Southern Pacific Co., 214 Cal. 81, 3 P. (2d) 1015	66
State Bank of Chicago v. Mid-City Trust & Savings Bank, 295 Ill. 599, 129 N.E. 498	5
Steinhart v. National Bank, 94 Cal. 362, 29 Pac. 717.....	12
Utah Construction Co. v. Western Pacific Railway Co., 174 Cal. 156, 162 P. 631	18
Wells Fargo Bank v. Bank of Italy, 214 Cal. 156, 4 P. (2d) 781	56
Williams v. Hasshagen, 166 Cal. 386, 137 P. 9	62
Yuma National Bank v. Balsz, 237 Pac. 198, 28 Ariz. 336	62

Statutes

California Bank Act, Section 16(c)	6, 7, 19, 26, 27, 35
California Banking Code, Sections 1010 to 1019	19
California Civil Code:	
Section 1559	29
Section 1577	63
Section 3108	41, 42
Section 3265(a) and 3265(b)	5
Section 3524	56

	Pages
California Code of Civil Procedure, Section 440	27
Illinois Negotiable Instrument Law, Section 185a	4
Illinois Revised Statute:	
Section 207(a)	4, 5, 6, 7, 8, 13
Section 211	6
Ill. Smith-Hurd Ann. St. Ch. 98, Sections 206 and 207....	5

Texts

9 C.J.S. 486, Section 232	15
9 C.J.S. 498-499, Section 243	17
9 C.J.S. 504, Section 247	23
17 C.J.S. 763, Section 325(b)	33
Restatement, Contracts, Section 74, pages 81, 82	62

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REPLY BRIEF FOR APPELLANTS.

I. A BRIEF STATEMENT OF THE BASIC FACTS.

Despite our efforts to deal concisely with the many complex questions of law and fact and the numerous arguments of Merchandise, we believe the long and complicated discussions in our opening brief and the brief of our opponents may have obscured the basic facts of the case. It may be appropriate, therefore, at the outset of our reply to make a chronological and brief statement of these facts.

On November 10th, there was a collected balance to Lofendo's account in the Branch of \$13,061.17.

On November 10th, the Branch sent the four checks to Merchandise for collection.

On November 12th, Merchandise received the four checks, marked them paid, charged United's account and credited the account of Bank of America with their proceeds, \$89,813.10.

On November 13th the Branch sent the six checks to Merchandise for collection.

On November 15th Merchandise received the six checks, marked them paid, charged United's account, and credited the account of Bank of America with their proceeds, \$113,216.50.

On November 15th Bank of America gave Lofendo immediate credit for checks drawn by United on Merchandise for \$97,207.00, and sent those checks to another Chicago bank for collection from Merchandise.

On November 15th the Branch received checks drawn by Lofendo on his account at the Branch for \$75,586.86, but neither rejected nor charged them against the account. At the close of business on November 16th, Bank of America paid these checks by not having rejected them within the time prescribed by law. \$51,862.36 of the proceeds of this payment went to reduce United's debt to Merchandise.

On November 16th the Branch received checks drawn by Lofendo on his account at the Branch for \$109,569.15, and entered a debit for them against the

balance then posted to the credit of the account (the \$13,061.17 of collected funds and the \$97,207.00 of uncollected funds) thus paying \$96,507.98 against uncollected funds, and, in effect, lending that amount to Lofendo. The entire proceeds of this payment by the Branch went to reduce United's debt to Merchandise. After the entry of this charge, the balance posted to the credit of the Lofendo account at the Branch was \$699.02.

On November 16th the advices of credit for the four checks were received at the Branch.

At the close of business on November 16th, the situation was this: first, the ledger card of the account showed the credit balance of \$699.02; second, Lofendo, according to Bank of America's contention, was entitled to the credits for the four and six checks (a total of \$203,029.25); and third, Bank of America had paid the checks for \$109,569.15 and \$75,586.86 (a total of \$185,156.01) drawn by Lofendo on the account, and \$161,431.51 of this \$185,156.01 had been paid to Merchandise to apply on account of United's indebtedness to it.

On November 18th, pursuant to the practice of delayed posting, Bank of America's internal bookkeeping entries showing the credit of \$89,831.10 and the charge for \$75,586.86 were posted to the account as of the 17th.

Late in the afternoon of November 18th, the Branch received notice that Merchandise had rejected the checks for \$97,207.00.

On November 18th the advice of credit for the six checks was received at the head office of Bank of America to which it had been misdirected by Merchandise, and was forwarded by that office to the Branch. On November 19th the Branch received the advice of credit for the six checks, and on that day Bank of America's internal bookkeeping entries, showing the credit of \$113,216.50 and the charge-back of the rejected checks for \$97,207.00, were posted to the Lofendo account, leaving a balance to Lofendo's credit of \$30,954.76.

II. MERCHANDISE'S CONTENTION THAT THE CHECKS WERE NOT PAID WHEN CHARGED AGAINST UNITED'S ACCOUNT IS ERRONEOUS.

1. The checks were paid by virtue of section 207(a)¹ of the Illinois Revised Statutes.

We argued this point on pages 17-20 of our opening brief.

Merchandise's answer is that the purpose of section 207(a) was to partially restore the former exceptional rule of Illinois in effect before its adoption of the Negotiable Instrument Law that a check operates as an assignment, that is if the bank fails to reject a check within the time specified by section 207(a), the lapse of time operates "not as payment," but "as an acceptance and thus as an assignment from the drawer to the payee or holder of the drawer's rights as creditor against his bank;" and that as Merchan-

¹This section of the Illinois Revised Statutes is also section 185a of the Illinois Negotiable Instrument Law.

dise's "acceptance" of the checks under section 207(a) was by mistake, it may revoke such acceptance (MB, 43-46).²

We dare say that if this were held to be the law no one would be more astonished than the bankers of this country. But it is nothing more than a rather ingenious but fantastic argument.

A check is payable by the bank on which it is drawn on presentation.³ And in *State Bank of Chicago v. Mid-City Trust & Savings Bank*, 295 Ill. 599, 129 N.E. 498, the court said:

"* * * Section 184 of the Negotiable Instruments Act (section 202) provides that the provision of the act applicable to bills of exchange apply to a check, and section 131 (section 149) that the acceptance of a bill must be in writing signed by the drawee. Payment is the final act which extinguishes a bill. Acceptance is a promise to pay in the future and continues the life of the bill."

When section 207(a) as it stood in 1948 provided that a drawee bank "is allowed until the end of the next business day following the day of presentation to decide whether it will *pay* the check,"⁴ it meant presentation for payment, not acceptance; and it meant a payment which would extinguish the check, not an acceptance which would keep it alive. And the section

²"MB" signifies Merchandise's brief.

³Ill. Smith-Hurd Ann. St. Ch. 98, secs. 206 and 207; Cal. Civil Code, sec. 3265(a) and 3265(b).

⁴The section is quoted in full on page 18 of our opening brief.

says that the bank shall be allowed the time to decide whether to “*pay*”, not to decide whether to accept.

Section 211 of the Illinois Revised Statute contains that provision of the Negotiable Instrument Law that “A check of itself does not operate as an assignment.” If as Merchandise contends, the Illinois legislature had intended to modify this rule by the adoption of section 207(a), it would have made its intention clear by amending section 211 to provide that “A check of itself does not operate as an assignment except to the extent provided in section 207(a).”

But section 207(a) was not intended to modify section 211. Illinois adopted section 207(a) for the same reason that California adopted the comparable provision of section 16(c) of the Bank Act,⁵ that is to lay down a precise and definite rule prescribing the time within which a bank to paraphrase the language of section 16(c), must either find a check good or return it unpaid. As checks in our economy function practically as currency, it is essential that the question whether or not they have been paid be governed by such a rule. And if Merchandise is right in its contention that section 207(a) modified in Illinois the rule of the Negotiable Instrument Law that a check does not operate as an assignment, then section 16(c) had the same effect in California; but this would be absurd.⁶

⁵This provision of section 16(c) is quoted in a footnote on page 19 of our opening brief.

⁶Merchandise says in a footnote on page 43 of its brief that the 1949 amendment to section 207(a) “completely changed” the

In answer to our claim that LeRoy in his conversation with Duncan claimed the advantage of the provision of section 16(c) comparable to section 207(a), but that his bank desires to repudiate the rule of section 207(a) when it works to its disadvantage (OB, 19-20),⁷ Merchandise says that the checks to which LeRoy referred were sent out in a cash letter (MB, footnote 15).⁸ But this fact makes no difference at all. Section 207(a) provided that "The drawee bank named in a check presented to it by mail or through a clearing house association or through a settlement with another bank or for deposit in an account" is allowed the time therein prescribed to decide whether it will pay the check. The section applies to all checks no matter how presented for payment.

Merchandise argues that *Rock Finance Co. v. Central National Bank of Sterling*, 339 Ill. App. 319, 89 N.E. (2d) 828, supports its claim that a bank by permitting the time prescribed by section 207(a) to

section. Section 207(a) as it stood in 1948 provided that a bank is allowed until the end of the next business day following the day of presentation to decide whether or not it will pay a check presented to it; whereas, the section as amended provided that a bank may reject such a check, but must do so not later than midnight of the bank's next business day after the item was received. Although the verbiage of the section was changed by the amendment, its substance remains the same.

⁷"OB" signifies Bank of America's opening brief.

⁸Whenever Merchandise is at a loss for an argument, it bases its claim on the difference between cash and collection letters. But as we shall show these claims, as in the case of the one referred to in the text, are made up out of whole cloth and are utterly fallacious.

elapse does not pay a check, but only accepts it (MB, 45-46). The case does not support the claim at all.⁹

2. Merchandise's efforts to distinguish Bank of America's authorities are futile.

Merchandise says that the holding of cases like *Hay v. First National Bank*, 224 Ill. App. 286, and *American Exchange National Bank v. Gregg*, 138 Ill. App. 596, 28 N.E. 839, in which both the payee and the drawer had their accounts in the same bank, do not apply because in them "the situation is the same as if he [the payee] had presented the check, received the cash, pushed it across the counter and redeposited it" (MB, 94). But when the drawee bank marks the check paid and charges the account of the drawer, it is payment, whether or not the payee has his account with it. The courts say that in either case the situation is the same as though the drawee had paid the money over the counter. In *Hallenbeck v. Leimert*, 295 U.S. 116, 55 S. Ct. 687, one of the cases cited by us in this connection, the court, in holding that the Central Bank had paid checks to the forwarding bank by not rejecting them on the day of their presentation, said:

⁹All that the court in this case held was that under section 207(a) the defendant bank had until midnight of the next business day following the presentation of checks to decide whether to pay them; that therefore the plaintiff's contention, that the bank's failure to act before 3 P.M. of that day constituted under the section an implied acceptance of liability on the checks, could not be sustained; and that the summary judgment in favor of the bank should be affirmed.

“We think the conduct of Central Bank constituted irrevocable payment of the five checks, as if cash had passed over the counter.”

Merchandise claims that other cases cited by Bank of America in this connection, like *Security National Bank v. Old National Bank*, 241 Fed. 1, and *Hayes v. Tootle-Lacy National Bank*, 72 Fed. (2d) 429, are not in point because they involved the rights of holders in due course and did not involve fraud or mistake (MB, 96-97). The question whether a payee is a holder in due course or whether a bank has been induced by fraud or mistake to pay a check becomes relevant when a bank has paid it and is seeking to recover the payment; but neither question has a bearing on the question whether the check has been paid. Bank of America's cases show that when a bank marks a check paid and charges the account of the drawer, the check is paid whether or not the drawer has sufficient funds to his account to pay it. The question whether Merchandise can recover its payment of the checks is a totally distinct question with respect to which totally different considerations and authorities are relevant.

Merchandise cites *Friedman v. Irving Trust Company*, 300 N.Y.S. 51; *Pacific National Agricultural Credit Corporation v. Wilbur*, 2 Cal. (2d) 576, 42 Pac. (2d) 314, and *Bohlig v. First National Bank*, 48 N.W. (2d) 445 (Minn.), in support of its statement that courts have held that where a drawee bank

marks a check paid and charges the drawer's account, it does not pay the check (MB, 79).

In the *Friedman* case the court held that the closing of the forwarding bank terminated both its agency and the subagency of the defendant bank for the collection of the checks and that, therefore, the defendant bank made itself liable for the conversion of checks by collecting them and crediting them to the forwarding bank's account after knowledge of the closing of the forwarding bank.

In the *Wilbur* case, the court held that in the absence of a special agreement a chattel mortgage taken in place of a prior mortgage was not a satisfaction of the first mortgage, but a renewal of it and that therefore the defendant was liable for the conversion of sheep which were subject to the first mortgage and which the defendant had sold before the execution of the second mortgage.

In the *Bohlig* case the court held that the drawer of a check could stop payment at any time while the funds continued subject to the control of the drawee bank.

None of these cases supports in any way whatever the proposition in support of which Merchandise cites them.

Merchandise repeats that Bank of America "paid" or "honored" the checks for \$109,569.15 by charging them against Lofendo's account on November 16th (MB, 11; 18-19). Is it not absurd for Merchandise

to say that Bank of America paid these checks by charging them against Lofendo's account and at the same time claim that Merchandise did not pay the four and six checks by similar acts?

3. **Merchandise's claim, that the credit balances against which the four and six checks were charged were "apparent" and not good balances is not sound.**

We argued this point on pages 22-28 of our opening brief.

Merchandise does not challenge in any way our statement of the facts on which our argument was based (OB, 22-26).

The principal answer Merchandise makes to the argument is simply that as United obtained by fraud its loans credited to its account, such credits created "apparent," not real credit balances (MB, 6; 46-47).

But the loans were made; and so on November 12th and 15th, the dates on which the four and six checks were charged against the account, Merchandise was indebted to United in the amount so credited to United's account, subject, however, to Merchandise's right to disaffirm the loans on the ground that they had been obtained by fraud and to cancel and restore to United its notes, and subject to Merchandise's right to offset its indebtedness to United against United's indebtedness to it. But it did not disaffirm or exercise its right of offset until the four and six checks had been charged against the account, and so when they were charged against it, there was a good, not an apparent balance in the account.

Suppose a bank is induced by fraud to loan a customer \$10,000.00 which is credited to his account. Can the bank while it still holds the note evidencing the loan and before it has disaffirmed the transaction maintain that the \$10,000.00 credit is fictitious and that therefore checks charged against the credit have not really been paid?

Merchandise says that Bank of America's argument was "rejected" in *Steinhart v. National Bank*, 94 Cal. 362, 29 Pac. 717 (MB, 47-48); and it relies heavily on this case. In the *Steinhart* case the bank pursuant to the instructions of the maker of a note charged it against the maker's account and marked the note paid and drew a check in payment of the note; but having discovered on the same day that the maker had made an assignment for the benefit of creditors and was overdrawn, it cancelled the check and reversed the entries. The court held that the holders of the note could not recover the amount of the note from the bank on the theory that the bank had paid it because the transaction so far as the holders were concerned was "incomplete," and that if the transaction were regarded as a contract on the part of the bank to loan the maker the money to pay the note, the bank had a right to rescind it on the ground of mistake. The case is not in point and does not reject Bank of America's argument at all.

Merchandise argues that "While United Produce's commercial ledger sheet on plaintiff's books had a credit figure, that sheet was not United's account

with plaintiff;" but that United had "one account" with Merchandise recorded not only in the ledger of its commercial account, but in the other ledgers maintained by Merchandise to show its transactions with United;¹⁰ and that "the true balance of the account could be ascertained only by consulting all the papers together," and that when "so consulted, there was no credit balance" (MB, 49).

If a bank makes a demand loan of \$10,000.00 to a man and records the loan on a ledger sheet, and if it credits the proceeds to the man's commercial account, the books of the bank will show that the man has a credit balance of \$10,000.00 against which he can draw checks; and this is so whether one says that he has two accounts with the bank or only one; and he has the right to draw checks against the credit until the bank eliminates the credit by exercising its right of offset.

But the law is that a bank pays a check under statutes like section 207(a) by not rejecting it in time; and that a bank pays a check by marking it paid and charging the account of the drawer; and that it pays either in one way or the other whether or not the drawer has sufficient funds on deposit to meet the check. And so Merchandise paid the four and six checks whether or not the balances to United's account were "apparent" and not good balances.

¹⁰These other ledgers were the "note liability ledger", which showed the notes executed by United to Merchandise; "the assigned accounts receivable ledger", which showed the assignments of receivables and the amount of the remittances; and "the draft discount ledger", which showed the drafts of United discounted by Merchandise (Deft's Ex. NN; IV; 1274-1285).

III. MERCHANDISE'S CONTENTION, THAT UNDER THE COLLECTION CONTRACT BETWEEN LOFENDO, BANK OF AMERICA AND MERCHANDISE COLLECTION AND PAYMENT WERE NOT CONSUMMATED UNTIL BANK OF AMERICA MADE BOOK ENTRIES ON MERCHANDISE'S ACCOUNT WITH IT, IS ERRONEOUS.

1. Statement of this contention by Merchandise.

Merchandise argues that under the contract between Lofendo, Bank of America, as the forwarding bank, and Merchandise, as the collecting bank, collection and payment of checks sent by Bank of America to Merchandise "were consummated only by a charge made against" Merchandise's "account on" Bank of America's "books in San Francisco pursuant to an outstanding authorization to make it," and that "nothing short" of such a charge could change the relationship of Bank of America and Merchandise from that of agent and subagent for Lofendo to that of creditor and debtor (MB, 34-35; 80; and 82-83). "The vital question," it says, is "what was the contract" (MB, 82).

For Merchandise, this is the crucial contention, the foundation of its most vital arguments. If Merchandise cannot make this contention good it cannot prevail. But the converse is not true; as we shall see, Bank of America can defeat Merchandise's claims even though this contention of Merchandise were sound.

In considering Bank of America's answers to this contention we should have in mind that when a forwarding bank sends a check directly to the drawee bank for collection and payment, the forwarding bank

is acting as agent of the depositor and the drawee bank is acting in a dual capacity; in the first place the drawee bank is acting as the subagent of the depositor to present the paper to itself, collect it and transmit the funds to the forwarding bank; and it is also acting as the drawee bank, charged with the duty of paying the check if it has funds of the drawer in its hands. 9 C.J.S. 486, sec. 232. There is no controversy about this.

2. **The attempted revocation by Merchandise of the advice of credit for the six checks did not alter the fact that these checks had been collected and paid.**

Merchandise concedes that the checks were paid when the charges were made against its account with Bank of America, provided that the charges were authorized by an advice of credit. It says that the advice of credit for the six checks was revoked before the charge against its account was made, and that therefore the charge was not authorized (MB, 28).

In *Rickey v. New York State National Bank*, D.C. N.D. N.Y., 7 F. Supp. 29 (affirmed without opinion 70 F. (2d) 1020 and cited on page 33 of our opening brief), the court said:

“The notice of the payment of the Barker draft was no part of the transaction itself, but only evidence of the transaction. The legal effect would be the same if the notice had never been made or mailed.”

In *Dean Tobacco Warehouse Co. v. American National Bank*, 123 Tenn. 365, 117 S.W. (2d) 746 (cited on page 33 of our opening brief), the court said:

“* * * When the credit was given the transaction was completed. The notice of the payment of the check was not part of the transaction itself, but only evidence of the transaction. *Rickey v. New York State Bank*, supra; *People v. Sheridan Trust and Savings Bank*, supra; *Storing v. First National Bank*, 8 Cir., 28 F. 2d 587, 589.”

The advice of credit for the six checks was merely a notice that Merchandise had paid the checks and granted the credit. It did not create or affect the rights of the parties. Those rights were fixed by the facts, by what had taken place. And so Merchandise's attempted revocation of the advice of credit for the six checks did not operate like an order stopping payment of a check; but the rights of the parties remained exactly what they were, regardless of such revocation.

3. If Merchandise were right in its contentions, the four checks were paid.

But in any event Merchandise did not attempt to revoke the advice of credit for the four checks. And so if Merchandise were right in its contention that the checks were not collected and paid until Bank of America charged Merchandise's account, and that Bank of America could not make such a charge until it had in its hands an unrevoked advice of credit, even so the four checks according to its own contention were paid.

4. The California Bank Act does not support Merchandise's contention.

Merchandise says that its contention, that the contract was that collection and payment could only be consummated by the entry of debits against Merchandise's account, is "fortified" by section 16c of the California Bank Act. It claims that this is so because the section did not authorize Bank of America to accept in payment of the four and six checks a credit with Merchandise, but that on the contrary the section forbade it from doing so (MB, 58-59; 89-90).¹¹

Prior to the adoption in 1925 of section 16c, the California law was that a bank having paper for collection could only receive money in payment and that if it took something else it did so on its own responsibility and its liability to its depositor thereupon became fixed, as much as though it had received the cash. *Luckehe v. First National Bank of Marysville*, 193 Cal. 184, 223 P. 547.¹² And the law elsewhere was the same. 9 C.J.S. 498-499, sec. 243. In the *Luckehe* case the court said:

"* * * Having no authority to receive, in payment of commercial paper entrusted to it to collect, anything but money, a bank accepting negotiable paper in lieu of currency, for a draft, it

¹¹Merchandise says that "if the law of the state where the depositor and forwarder are located will permit" the forwarder to accept in payment a credit on the books of the collecting bank with which the forwarder has an account, then such a credit can be regarded as payment; but that "In California this is forbidden" (MB, 89-90 and footnote 45, p. 90).

¹²Merchandise cites this case on page 64 of its brief.

was employed to collect, does so upon its own responsibility. (Citing cases) * * * If the collecting bank surrenders the check to the bank upon which it is drawn, and accepts a cashier's check or other obligation in lieu thereof, its liability to its depositor is fixed, as much so as if it had received the cash (*Fifth National Bank v. Ashworth*, 123 Pa. St. 212 [2 L.R.A. 491, 16 Atl. 596]), and it must be held to have immediately become indebted to its depositor in the amount which the paper represents."

In *Utah Construction Co. v. Western Pacific Railway Co.*, 174 Cal. 156, 162 P. 631, the forwarding bank instructed the drawee-collection bank to credit checks to the account which the forwarding bank had with the collecting bank. The collecting bank entered the credit and then closed its doors. The court held that the payee was bound by the act of its agent, the forwarding bank, and that consequently the checks were paid by the entering of the credit and the drawer discharged from liability. The court said:

"* * * The presentation of the check and the acceptance of credit instead of payment was a waiver of payment. The railway company [the drawer] did not authorize the taking of credit. That act created the relation of debtor and creditor between the Safe Deposit Company [the drawee-collecting bank] and the Ogden bank [the forwarding bank] and satisfied the check. * * * But here the checks, though not agreed to be taken as payment, were satisfied by the taking of credit therefor."

Although the point was not before the court and was not discussed, it is clear that in this case the forwarding bank would have been liable to its principal for taking the credit rather than money in payment of the checks.

Section 16c of the California Bank Act changed the rule of the *Luckehe* case.¹³ (The section was adopted in 1925, the year following the *Luckehe* decision.) It provided that a bank may forward a check for collection directly to the bank on which it is drawn; and then it contained a provision, which we for convenience shall call "the payment provision", reading as follows:

"* * * and in payment thereof there may be accepted either money or the check or draft of the bank on or by which it is drawn, or at or through which it is made payable, or the check or draft of any bank to or through which it has been forwarded for collection, or credit therefor may be accepted with any Federal reserve bank, or with any bank designated as a depository by *the bank allowing such credit.*"

Merchandise says that under the section Bank of America could have accepted a "credit on the books of any bank *designated by Merchandise* [our own emphasis] as a depository," but that "A credit on

¹³Section 16c was superseded by the adoption in 1949 of sections 1010 to 1019 of the California Banking Code; and these latter sections were in turn superseded by the adoption in 1951 of the California Financial Code; but as section 16c was in effect in 1948, it controls this case.

Merchandise's own books is not recognized by the statute, since plaintiff could not be its own depository, nor was it defendant's depository" (MB, 58-59).

In other words, Merchandise claims that the italicized expression at the end of the payment provision gives the collecting drawee bank (not the forwarding bank) the power to designate the depository the credit of which can be accepted in payment under the section.

The first clause of the section provides that "Any credit allowed by any bank * * * for any check * * * drawn on * * * any other bank * * * shall be provisional only subject to final payment and to the receipt by *the bank allowing such credit* of the funds in actual money or in solvent credit on the books of any Federal Reserve bank or on the books of any bank designated as a depository by *the bank allowing such credit*." Obviously the expression in the first clause which we have italicized means the forwarding bank, not the collecting-drawee bank; and obviously also this expression in the first clause means the same thing as the same expression in the payment provision which we have italicized. And then the last sentence of the section reads that "Until the proceeds of any such check * * * shall have been actually received by *the bank allowing such credit* in actual money, or in solvent credit on the books of any Federal Reserve bank or on the books of any bank designated as a depository by *the forwarding bank*, such checks * * * may be charged back to * * * the party from whom it was received * * *" Again the expression "the

bank allowing such credit" means the forwarding bank; and in this last clause the bank which has the power to designate the depositary is actually referred to as the "forwarding bank."

It would have been a strange thing if the statute had provided that the collecting-drawee bank could designate the depositary the credit of which could be accepted in payment rather than the forwarding bank to which a depositor intrusts his paper for collection and which has the primary responsibility for its collection.

Merchandise's contention that section 16c gives the collecting-drawee bank the power to designate the bank whose credit is to be accepted in payment is entirely and absolutely wrong.

Merchandise's statement that section 16c "forbids" a forwarding bank to accept a credit of another bank in payment (MB, 89-90 and footnote 45, p. 90) is unadulterated nonsense. The payment provision states that a forwarding bank "*may*" accept the things therein specified as payment. Furthermore, if a forwarding bank accepted something else in payment, then the rule of the *Luckehe* case would apply, that is, the check would be paid and the bank would immediately become responsible to its depositor just as though it had taken cash.

There can not be the slightest doubt that section 16c changed the rule of the *Luckehe* case by providing that a forwarding bank could accept in payment the things specified in the payment provision, includ-

ing the credit of any bank designated by it as a depository. Bank of America, therefore, was authorized by this section to accept in payment of the four and six check credits with Merchandise.

5. The "contract" between Lofendo and Bank of America as established by the law and banking practice was that Bank of America could accept in payment of checks forwarded for collection credits with Merchandise.

As stated, Merchandise contends that "the contractual arrangement" between Lofendo, Bank of America as the forwarding bank and Merchandise as the collecting-drawee bank must control (*supra*, p. 14).

On some occasions when checks drawn by United to Lofendo's order came in the mail to the Branch, the Branch gave Lofendo immediate credit for them (subject to charge back under section 16c of the California Bank Act if not paid) and on other occasions it did not give him credit but sent the checks on for collection (IV, 1175-1176). In the banking business throughout the United States checks are transmitted by banks to other banks for collection either by means of cash letters or collection letters (IV, 1186). If the bank gives immediate credit subject to charge back it uses a cash letter (IV, 1186); but if it does not give such a credit, it uses a collection letter containing instructions how to remit the funds (IV, 1186-1187). When Lofendo caused the checks to be delivered to Bank of America, it had the right to assume that he wanted it to follow either one or the other of these customary ways of collecting checks, provided that

it contravened no rule of law.¹⁴ Furthermore, Lofendo and Bank of America are presumed to have contracted with reference to section 16c and the provisions of that section are in effect a part of the contract. *Federal Reserve Bank v. Malloy*, 264 U.S. 160, 164, 44 S. Ct. 296, 298; *Dakin v. Bayly*, 290 U.S. 145, 147, 54 S. Ct. 113, 115 (a case much relied on by Merchandise). And so Lofendo impliedly agreed that Bank of America could collect the four and six checks by sending them directly to the drawee bank for collection;¹⁵ that Bank of America could accept in payment anything which a bank was authorized by section 16c to accept, including the draft of or a credit with

¹⁴In *Davis v. First National Bank of Fresno*, 118 Cal. 600, 602-603, 50 Pac. 666, the court said:

“* * * One who gives a draft to a bank to collect is held to have an implied knowledge of its usage in collecting drafts, so far as such usage does not contravene any rule of law. (Morse on Banking, sec. 9; *Bank of Washington v. Triplett*, 1 Pet. 25.) ‘The fact that one deals with the bank without taking the trouble to inquire as to its system will raise the implication that he already knows and is satisfied with that system. It is clear that if a person hands over a note to a bank for collection, without any species of remark as to the course to be pursued, the bank is not bound to thrust upon him a statement of its intended course and to retain him until the whole theory had been expounded to him, when his conduct unmistakably shows that either he already knows it, or else he does not desire to know it. Either he knows and approves it, or he voluntarily trusts to the wisdom of the bank at his own deliberately assumed risk of its sufficiency. In such a case the bank not only has a right to assume, but it is even positively bound to assume, that his desire is that the ordinary and established usage be pursued.’ (Morse on Banking, sec. 221.)”

¹⁵Section 16c provides that a forwarding bank could forward a check directly to the drawee bank for collection. Prior to the adoption of this statute the law was that a forwarding bank could not send a check to the drawee bank for collection and that if it did, it was responsible if the check was not collected. 9 *C.J.S.* 504, sec. 247.

Merchandise. But under the rule of the *Luckehe* case if Bank of America had accepted in payment something which it was not authorized to accept, it did so on its own responsibility and its liability to Lofendo thereupon became fixed just as though it had received the cash.

So much for the contract between Lofendo and Bank of America under which the collection was made.

6. **Merchandise upon giving the credit became the owner of the fund.**

When Merchandise gave Bank of America the credits, it acknowledged itself indebted to Bank of America. This is what the giving of a credit means in plain English.

And when Merchandise charged United's account and credited Bank of America, it thereupon became the owner of the proceeds of the checks, which proceeds passed into its general funds. This is one of the crucial facts in the case. And it is one of the principal reasons advanced by those cases on which Bank of America relies for their holding that where the instructions of the forwarding bank are to collect and credit, there is a change in relationship to that of debtor and creditor as soon as the collecting-drawee bank gives the credit (OB, 32-35).

7. The "contractual arrangement" between Bank of America and Merchandise: Under it the checks were collected and paid when Merchandise gave its credits, regardless of when Bank of America entered these credits on its books.

The simple and clear proof of this arrangement was the instructions given by Bank of America, as Lofendo's agent, to Merchandise, as his subagent, by the collection letters and Merchandise's response thereto by the advices of credit.

It will be recalled that each of the collection letters stated that the checks described in it "were enclosed for collection;" that the "documents" (either the four or the six checks) should be delivered "only on payment;" that Merchandise should "make separate remittance or credit for this collection as indicated below;" and that Merchandise should "dispose of the proceeds" by crediting Bank of America with advice to the Branch instead of following one of the alternative methods of remitting the funds by draft.¹⁶

It will also be recalled that Merchandise, after marking the checks paid and charging them to United's account and crediting Bank of America on its ledger, sent Bank of America its advices of credit stating in effect that the checks had been paid and that it had credited Bank of America's account.

Merchandise maintains that "the request in the collection letter to credit Bank of America was "a re-

¹⁶The collection letter accompanying the six checks is reproduced on page 1268 of the record. It was stipulated that the collection letter accompanying the four checks was in the same form as the collection letter accompanying the six checks (I, 302-303). The provisions of the collection letter are stated somewhat at length on pages 35-36 of Bank of America's opening brief.

quest” by Bank of America “for written authority to credit itself by charging” Merchandise’s “account in San Francisco;” and that until this “occurred the funds were not ‘disposed of’ ”, that is, disposed of within the meaning of these words as used in the collection letter (MB, 85).

The most sophistical sort of argument cannot distort the simple facts of this case into such an arrangement. Bank of America was authorized by section 16(c) to accept credits with Merchandise in payment of the checks. The collection letters directed Merchandise to give Bank of America credits in payment. Merchandise charged United’s account and became the owner of the proceeds of the checks and gave Bank of America the credits and notified Bank of America that it had done so. This was the contractual arrangement between the banks and nothing else.

Merchandise says that under “the contractual arrangement” the funds were not transmitted to Bank of America until Bank of America had charged Merchandise’s account with it (MB, 94).

As the contractual arrangement evidenced by the collection letters was that Bank of America would accept payment by credits, the funds were *ipso facto* transmitted when the credits were granted.

In *Commercial National Bank v. Armstrong*, 148 U.S. 50, 13 S. Ct. 532,¹⁷ the forwarding bank, referred

¹⁷In their research counsel for Bank of America did not discover this case until after their opening brief was filed and so it is not cited therein.

to in the opinion as "Fidelity," was indebted to certain of its subagents, the collecting banks, and these subagents upon collecting the various checks sent them for collection and payment, entered in their books credits upon Fidelity's indebtedness to them. The court in holding that Fidelity had received the funds upon the giving of the credits said:

"We also agree with the circuit court, in the conclusions as to those moneys collected by subagents to whom the Fidelity was in debt, and which collections had been credited by the subagents upon the debts of the Fidelity to them before its insolvency was disclosed; for there the moneys had practically passed into the hands of the Fidelity. The collection had been fully completed. It was not a mere matter of bookkeeping between the Fidelity and its agents. It was the same as though the money had actually reached the vaults of the Fidelity. It was a completed transaction between it and its subagents, and nothing was left but the settlement between the Fidelity and the principal,—the plaintiff."

This conclusion is in accordance with section 440 of the California Code of Civil Procedure which provides that cross-demands shall be deemed compensated so far as they equal each other.

Banks do not pay one another by transmitting currency; but by credits or drafts.

And it will be recalled that section 16(c), after providing that a forwarding bank may accept a credit in payment of a check, provides that until the pro-

ceeds of a check "shall have been actually received * * * in solvent credit on the books of any bank designated as a depository by the forwarding bank," it may be charged back. The credits granted by Merchandise were solvent, and when they were granted Bank of America had "actually received" payment by means of such credits.

But whether or not the funds are to be deemed to have been actually transmitted upon the giving of the credits the fact is that when Merchandise pursuant to the collection letter charged United and credited Bank of America, it thereupon became the owner of the fund and ceased to be a subagent for collection of the checks and became indebted to Bank of America and Bank of America became indebted to Lofendo.

8. Merchandise's contention that there was no consideration for a change in relationship raises a false issue.

Merchandise argues that if there were a change in relationship from agency to debtor and creditor, it must be based upon a supposed contract by Merchandise to pay Bank of America; that the only consideration supporting such a contract would be Bank of America's assumption of Merchandise's obligation to Lofendo; but that there was no consideration for such a contract, because Merchandise by reason of United's fraud had no obligation to Lofendo (MB, 33; 56-57). And it also says that if such a contract had been supported by a consideration, it would have been a contract for the benefit of Lofendo which under Cali-

fornia Civil Code section 1559 could be rescinded by the parties to it without Lofendo's consent (MB, 61).

The contention is entirely fallacious.

When Merchandise gave the credits, it was not making a promise to Bank of America for the benefit of a third party, Lofendo, in consideration of Bank of America's promise to assume Merchandise's obligation to Lofendo; but it as the collecting-drawee bank was simply collecting and paying the checks in accordance with the instructions given it by Bank of America while acting as Lofendo's agent for their collection; and at the same time it was becoming the owner of the proceeds of the checks. When Merchandise gave the credits, it was not assuming any obligation to Lofendo at all and Bank of America was not promising to assume any obligation of Merchandise to Lofendo, but Merchandise was simply acknowledging itself indebted to Bank of America. And when Bank of America was given these solvent credits, it in its turn became indebted to its depositor, Lofendo.

9. Merchandise relies on irrelevant matters to establish the contractual arrangement for which it contends.

- (a) The bookkeeping practice of Bank of America, in making charges against Merchandise's account with it, was wholly unrelated to either the time or the fact of payment.

When Bank of America sent to Merchandise for collection a check drawn on it, Bank of America's bookkeeping practice was not to enter the charge against Merchandise's account (carried on head office books at San Francisco) until the branch where the

collection had originated had authorized the head office to make the entry (I, 181).

This practice could not modify the collection arrangement between Lofendo and Bank of America and between the latter and Merchandise established by the circumstances just reviewed (*supra* pp. 22 to 28) by substituting for it the totally different arrangement for which Merchandise contends (MB, 15-16; 82), that is that the collection and payment of the checks were not to be consummated until Bank of America charged Merchandise's account.

Suppose, for example, that the branch after receiving on November 16th the advices of credit for the four checks had neglected to send the head office of the bank a memo that the advice had been received and that Merchandise's account should be charged;—would it then have been possible for the branch to say to Lofendo, "Yes, we have received in payment of the checks a solvent credit which Merchandise has allowed us and which we were authorized by the Bank Act to accept and Merchandise has the funds and is using them and we have received from Merchandise its advice that it, pursuant to our instructions, has given us credit, but we have not directed the head office to charge Merchandise's account and so the checks have not been collected and paid." The suggestion is absurd.

The facts must control the rights of the parties; not whether or not bookkeeping entries were made at Bank of America's head office.

(b) The difference between cash and collection letters does not support Merchandise's contention respecting the contractual arrangement.

Merchandise claims that this difference supports its claim now under consideration (MB, 13-15; 87-88).

It was stipulated that "in the banking business throughout the United States checks are transmitted by banks to other banks for collection either by means of 'cash letters' or 'collection letters'".

The essential fact is that both cash and collection letters are simply different methods of collecting checks.

The bank to which a cash letter comes gives credit to the forwarding bank immediately upon receipt of the letter subject to charge back if the check is not paid and the forwarding bank assumes collection unless advised of rejection; whereas, the collection letter contains instructions on how to remit the funds (whether by a credit or draft) and the forwarding bank does not assume collection until advised thereof (IV, 1186-1187). The credit granted pursuant to a cash letter can have no different legal effect from a credit granted pursuant to a collection letter; and the fact, that in one case the forwarding bank assumes collection if not advised to the contrary, but in the other does not make such assumption but awaits advice, is of no significance whatever.

Tarr, the chief clerk of the Branch (II, 560), testified that after October 22nd he put a "hold" on the Lofendo account, that is the Branch gave Lofendo provisional credit for the checks deposited to his account, but did not pay against them until they had

a chance to clear (II, 563; 581-582). The only practical difference between this way of handling checks and taking the checks for collection is that when the former method is used the bank will pay against the credit after allowing the checks time to clear; whereas, when the latter method is used the bank will not pay until it learns by mail, telegraph or telephone that the check has been paid. (See Estribou's testimony, I, 352; 407-408.) When the former method is used, the checks are collected by cash letter, while in the latter they are collected by collection letter. Certainly this insignificant difference between these two methods of collecting checks does not, as Merchandise says it does, tend to show that the contractual arrangement was something different from that established by the simple words of the collection letters themselves; in other words, that this contractual arrangement was that checks should not be deemed to have been collected and paid until Bank of America made the charges against Merchandise's account and that until then there was no change in relationship.

- (c) The record in which Merchandise entered the credits was not at all analogous to a "check stub"; its entry of the credits therein evidenced its giving of the credits.

Messenger testified that Merchandise entered in the ordinary course of business on Defendant's Exhibit H (the ledger card kept by Merchandise to show its transactions with Bank of America) debits in favor of Merchandise and credits in favor of Bank of America; but that the document was an "internal" docu-

ment and no copy of it was sent Bank of America (I, 312-313; 322-323).

A comparison of Defendant's Exhibit H with Plaintiff's Exhibit 1 (the ledger card kept by Bank of America to show its transactions with Merchandise) shows that they are substantially the same sort of record. One was no more "internal" than the other.

To say as Merchandise does that Defendant's Exhibit H was analogous "in every respect" to a check stub of a depositor in a bank (MB, 85-86) is preposterous. *Bank of America by the collection letters asked Merchandise to pay the checks by giving the credits and Merchandise gave them.* The entry merely evidenced that important act.

(d) The acts alleged to constitute "practical construction" of the contractual arrangement were unrelated to any contract.

Merchandise says that its conception of the contractual arrangement is supported by the practical construction of the parties (MB, 83).

17 C.J.S. 763, sec. 325(b) states:

"* * * Practical construction by conduct of the parties is a matter of knowledge and intention. To create a practical construction by acts of the parties, such acts must be done in pursuance of and by reason of the contract and with full knowledge of its terms; * * * and they must be direct and positive, as distinguished from acts of a doubtful or dubious character."

See, also, *Barnhart Aircraft Inc. v. Preston*, 212 Cal. 19, 24, 297 P. 20, 22.

In the Messenger-Estribou conversation and in the LeRoy-Duncan-Johnson conversations there was no reference of any sort to the contract which Merchandise claims existed, that is a contract that checks should not be collected and paid until Bank of America charged Merchandise's account and that until then there should be no change in relationship. There is nothing in the conversations to show that any of these men had any such alleged contract in mind or any intention to act under it. All that the conversations show is that the officers of Merchandise were claiming that the advice for the six checks had been sent out in error and that therefore they had a right to rescind it, and that the officers of Bank of America, believing that the Lofendo account was in the clear and having been told that Merchandise had been defrauded, was willing to follow the instructions of Merchandise.¹⁸

The conversations were not "direct and positive" acts deliberately performed with knowledge of the alleged contract and an intent to act under it. They had no bearing whatever on the alleged contract. They cannot be considered a practical construction to any extent whatever.

10. Conclusion respecting the point.

The contractual arrangement between Lofendo, Bank of America and Merchandise under which the

¹⁸See Messenger's testimony (I, 220-223); LeRoy's (II, 459; 480-481; 484; 485; 487-488); Estribou's (I, 396-398); Johnson's (II, 690-692; 697-698).

checks were collected was that Bank of America as Lofendo's agent would accept in payment the credits given by Merchandise as it was authorized to do by section 16(c). When Merchandise gave these credits, the checks were collected and paid. Merchandise became the owner of their proceeds, the agency of Bank of America and Merchandise for the collection of the checks was fulfilled and terminated and Merchandise became indebted to Bank of America and Bank of America to Lofendo.

The contention of Merchandise that the contractual arrangement was that the checks were not collected and paid until Bank of America charged Merchandise's account with it is not supported by the matters on which Merchandise relies to support it and is utterly erroneous.

IV. MERCHANDISE'S ATTEMPT TO DISTINGUISH BANK OF AMERICA'S CASES RELATING TO THE POINT THAT DEBTOR-CREDITOR RELATIONSHIP BETWEEN THE BANKS WAS ESTABLISHED WHEN MERCHANDISE GAVE THE CREDIT IS FUTILE; AND THE CASES ON WHICH IT RELIES RESPECTING THE POINT DO NOT SUPPORT IT.

1. As pointed out in our opening brief, the basic distinction in the cases is between those in which the instructions are to collect and remit and those in which the instructions are to collect and credit. When the instructions are to collect and remit, there is a conflict in the cases respecting the result, some courts holding that where the instructions are to collect and remit the agency is terminated and the debtor-creditor

relationship established upon the check being collected and paid, while other courts hold that in such a case the collecting-drawee bank upon paying the check continues to hold the fund as agent and that therefore the fund may be impressed with a trust. But there is no conflict where the instructions are to collect and credit; in such cases the courts hold without conflict that the collecting-drawee bank upon paying the check becomes the owner of the fund and the agency is terminated and the debtor-creditor relationship established (See Bank of America's opening brief, pp. 30-35).

Merchandise says that the cases on which Bank of America relies, the cases in which the instructions are to collect and credit, can be eliminated "out of hand" because they involved "a different contractual arrangement" (MB, 86-87). These cases did not involve a different arrangement. In them as in the case at bar the instructions were to collect and credit. They are precisely in point and decisive.

2. Merchandise also says that there is a vital difference between the case in which the forwarding bank gives its depositor a provisional credit as in the case of a cash letter and the case in which it does not enter such a credit until advised that the check has been paid as in the case of a collection letter; that in the former case there is a change in relationship from agency to debtor-creditor when the collecting-drawee bank pays the checks by giving the credit; whereas, in the latter case such a change in relationship does not occur until the forwarding bank enters

the credit (MB, 87-88). The attempted distinction is entirely untenable. A check is collected and paid when the collecting-drawee bank charges the depositor's account and gives the forwarding bank credit; at that time the purpose of the agency is fulfilled and the collecting-drawee bank becomes the owner of the proceeds of the check and indebted to the forwarding bank and the latter bank to the depositor; and this is so, whether or not the forwarding bank gives the depositor provisional credit upon receiving the check. The facts, not an unimportant book entry, control the rights of the parties.

Merchandise infers from the statements of fact made in the cases cited by Bank of America on pages 33-34 of its brief (cases holding that where the collecting-drawee bank gives a credit in payment of a check the relation of debtor-creditor is substituted for that of agency) that these were cash letter cases. Merchandise draws most of these inferences from the fact that the banks involved gave their respective depositors provisional credits upon the deposit of the checks. It is true that it was stipulated that the practice of banks was that when such a credit is given a cash letter is used (IV, 1186); but it cannot be assumed that this practice was invariably employed. None of the cases so cited by Bank of America said that a cash letter was used; and for all we know some other method of communication may have been used. But the fact that none of these cases mentioned the means by which its check was transmitted is certainly significant; it shows that none of them considered

the fact that a cash letter was used, if one was used, of any importance.

3. Merchandise says that Bank of America's reciprocal accounts cases are not applicable because there were not reciprocal accounts in this case (MB, 90). We presume that the remark is based on Merchandise's preposterous check stub analogy (*supra* pp. 32-33). This case is a case of reciprocal accounts (OB, 37-38).

4. Merchandise states that there are not reciprocal accounts until entries are made on the books of both banks, a credit on one side and a debit on the other (MB, 90). This confuses the making of the entries with the accounts. Reciprocal accounts exist when a charge or credit on one side is automatically a credit or charge on the other, whether or not entries are made (OB, 37-38). And the cases lend this contention of Merchandise's no support whatever. In *First National Bank of Corsicana v. Wm. Cameron & Co.*, 149 S.W. (2d) 132 (cited on page 34 of our opening brief), the forwarding bank had an account with the collecting-drawee bank. The court held that when the Corsicana Bank (the collecting-drawee bank) charged the account of the drawer and credited the account of the Blooming Grove Bank (the forwarding bank) "the Corsicana bank then ceased to be the agent either of plaintiff [payee of check] or of the Blooming Grove bank, but from that time on the Corsicana bank was a debtor of the Blooming Grove bank, which was in turn a debtor of plaintiff." In another of our cases, *Rickey v. New York State National*

Bank, 7 F. Supp. 29 (to which we have already referred and which is cited on page 33 of our opening brief), the collecting-drawee bank had an account with the forwarding bank, and the conclusion was just the same as that reached in the *Corsicana* case.

When the collecting-drawee bank becomes the owner of the funds and gives the credit, the change in the relationship takes place, whether the collecting-drawee bank maintains an account with the forwarding bank, or vice versa.

5. Now let us consider the cases on which Merchandise relies in this connection.

People v. People's Bank of Rockford, 353 Ill. 280, 187 N.E. 522 (MB 81; the case is discussed on pages 31-32 of our opening brief), is a collect and remit case. There is nothing in the case in conflict with the later Illinois case of *People v. Sheridan Trust and Savings Bank*, 358 Ill. 290, 193 N.E. 186, a collect and credit case, on which Bank of America relies (OB, 34). And in the first of these two cases, *People v. People's Bank*, the court said:

“We think it is clear that the forwarder of the check, in the absence of specific instructions to remit by the collecting bank’s own check or draft, and in the absence of reciprocal accounts, as in this case, never intends to become a creditor of the paying bank or to extend to it any credit or trust.”

When Bank of America instructed Merchandise by the collection letters to credit its account it manifested an intention to become a creditor of Merchandise

more unequivocally than if it had instructed Merchandise to remit by its own check.

Dakin v. Bayly, 290 U.S. 143, 54 S. Ct. 113, which is cited frequently by Merchandise (MB, 40; 58, 82, 91), is another collect and remit case. In it, the court said:

“But here we have no credit extended by the St. Petersburg bank [the collecting-drawee bank] to the Clearwater bank [the forwarding bank] on the faith of the checks forwarded for collection and no mutual deposit accounts, but a mere agency evidenced by a collection letter requiring collection and remittance. The fact that no credit was extended to the forwarding bank by the collecting bank leaves it open to the depositor to assert his claim against the latter, * * *”

Krueger v. First National Bank, 217 Ill. App. 18 (MB, 39), involved a draft drawn on a milling company, not a check, and was still another collect and remit case.

6. Summing up: The cases cited by Bank of America fully support its contention that the checks were collected and paid when Merchandise charged the account of United and credited Bank of America and that Merchandise thereupon became the owner of the proceeds and indebted to Bank of America and Bank of America to Lofendo; and Merchandise's attempts to distinguish those cases are futile.

On the other hand the cases cited by Merchandise are not only not in conflict with those relied on by Bank of America, but do not support in any way

whatever Merchandise's claim that the checks were not collected and paid and there was no change in relationship until Bank of America made entries on its books changing Merchandise's account.

**V. MERCHANDISE'S CONTENTION THAT BANK OF AMERICA
HAD NO RIGHT OF SET OFF IS ERRONEOUS.**

We argued this point on pages 45-54 of our opening brief.

After saying that a banker's lien is dependent on possession and that when a bank sends forward a check for collection it parts with its possession and loses its lien (MB, 52-53), Merchandise accepts the ruling of the *Kane* and *Goggin* cases which is exactly to the contrary (MB, 54).¹⁹

Then Merchandise without argument lays it down that as Lofendo was not indebted to Bank of America when Bank of America sent the checks forward for collection,²⁰ it cannot be considered a holder in due course of a lien on the proceeds under section 3108 of the California Civil Code (MB, 54-55). We submit that our argument to the contrary (OB, 51-52), which Merchandise ignores, is sound.

In our opening brief, we argued that assuming that Bank of America did not become a holder for value

¹⁹These cases are cited and discussed on pages 46-48 of our opening brief.

²⁰It will be recalled that the Branch sent the four checks forward on November 10th; that Merchandise paid them on the 12th; that the Branch sent the six checks forward on the 13th; that Merchandise paid them on the 15th; and that Lofendo did not become indebted to the Branch until November 16th.

under section 3108, nevertheless it did become a bona fide purchaser of its right of setoff against Lofendo; and therefore Merchandise is not entitled to recover the payments (OB, 51-53).

Merchandise's answer is based on its basic misconception, that is that the checks were not collected and paid until Bank of America made book entries charging Merchandise's account; that it owed nothing to Bank of America until these book entries were made; and that when on November 19th, they were made, Bank of America had notice of Merchandise's claim that the checks had been paid by mistake (MB, 54-55).

The elementary rules are that when a bank pays a check of a depositor, the depositor becomes indebted to it in the amount of the payment, but the bank when paying the check immediately acquires the right to offset such indebtedness of its depositor to it against any credits to which he is entitled. 9 C.J.S. 556-561, sec. 273.

When on November 12th and 15th Merchandise paid the checks by crediting Bank of America, it thereupon became indebted to Bank of America and Bank of America to Lofendo; that is on those days Lofendo became entitled to the credits; and when on November 16th Bank of America paid the checks for \$109,569.16 and \$75,586.86, Lofendo became indebted to it, and Bank of America thereupon became a bona fide purchaser of its right of setoff, that is its right to charge such payments against all the credits to which Lofendo was then entitled.

Merchandise says that the checks for \$109,569.16 were charged against the account on November 16th before the advices of credit for the four checks were received on that day, and that the checks for \$75,586.86 were paid by Bank of America's failure to reject them at the close of business on November 16th and that neither the checks for \$109,569.16 or those for \$75,586.86 were paid in reliance on the credit for the four checks for \$89,813.16, or of the six checks for \$113,216.50 (MB, 17-20).

Merchandise states in effect that Bank of America did not know until the evening of November 18th that it had charged the checks for \$109,569.16 against uncollected funds represented by the checks for \$97,207.00; that Bank of America did not know until the 17th that it had paid the checks for \$75,586.86 by not rejecting them on the 16th; and that although it knew on November 16th that Merchandise had given it credit for the four checks (the advices of credit for the four checks were received by the Branch on that day), it did not know until later that Merchandise had given it credit for the six checks.²¹ Merchandise then claims in effect that as Bank of America did not have knowledge of these things on November 16th, it cannot be regarded as a bona fide purchaser of its right of setoff (MB, 73).

²¹It will be recalled that the advice of credit for the six checks was mailed by mistake to the head office of Bank of America where it was received on the 18th and that it was then mailed by the head office to the Branch where it was received on November 19th.

But Lofendo's right to the credits did not depend upon whether some particular officer or clerk in the Branch was aware of the fact that Merchandise had granted the credits; and Bank of America's right to charge the checks for \$109,569.15 and \$75,586.86 against the credits did not depend upon whether some particular officer or clerk was aware of the fact that it had paid these checks, nor upon whether it paid the checks in reliance on the credits. Its rights depended upon the facts, upon the existence of the credits and upon the making of the payments; not upon the awareness of some officer or clerk of these facts. Lofendo was entitled to the credits; Bank of America had paid the checks. Its right to setoff depended on these facts and on nothing else.

Furthermore, these contentions of Merchandise's counsel show a fundamental misconception of the banking business. Take, for example, the Branch of Bank of America involved in this litigation. It had deposits of \$20,000,000.00 (I, 392); it by itself was carrying on a big business. Every day checks were pouring into it in large numbers. It was called upon by the law and by the clearing house rules to make rapid decisions with respect to the payment of checks. The Branch, like every other bank, in paying checks of any depositor, relied not only on the credits to which he was entitled then appearing on its books, but all credits to which he was entitled; in other words, on its right of offset. This right does not depend upon whether an officer or clerk happens to know of its existence; but upon the fact that it

does exist. A bank should be given the same treatment so far as its rights are concerned as it is given so far as its liabilities are concerned. A bank becomes liable whether or not an officer or clerk happens to know what is taking place. For example, Bank of America became liable to pay the checks for \$75,586.86 by not rejecting them in time without regard to whether an officer or clerk knew it was assuming this liability. And a bank becomes entitled to the right of offset or any other right allowed it by the law whether or not an officer or clerk happens to be aware of its existence.

Suppose in the case of a branch bank like Bank of America a depositor has a credit in one branch, but is indebted to another branch; would it not be absurd to suggest that the bank does not have its right of offset because the branch to which the depositor is indebted does not know of the credit to which he is entitled in the other branch?

There can be no doubt whatever that at the close of business on November 16th Bank of America had the right to charge the checks for \$109,569.16 and \$75,586.86 against the credits for the four and six checks; that it was a bona fide purchaser of this right of setoff; and that Merchandise cannot deprive Bank of America of it.

Merchandise also says that it "never paid any sum to the defendant for the purpose of discharging any debt that Lofendo may have owed defendant" (MB, 72). Of course, its clerks who handled the payment of the checks had no such purpose. But Merchandise

was charged with the knowledge that when it paid Bank of America the amount of the checks, Bank of America would have the right to offset the proceeds against any indebtedness Lofendo might happen to owe it.

VI. MERCHANDISE CANNOT RECOVER FROM BANK OF AMERICA ITS PAYMENT OF THE FOUR AND SIX CHECKS BECAUSE IT RECEIVED A SUBSTANTIAL BENEFIT FROM THEIR PAYMENT.

We argued this point on pages 54-56 of our opening brief; and Merchandise answered it on pages 112-116 of its brief.

\$161,431.51 of the checks for \$185,156.01 (the \$109,569.15 plus the \$75,586.86) was paid to Merchandise and was applied by it on United's indebtedness to it. Merchandise got the benefit of this \$161,431.51.

Merchandise's verbose argument cannot change the fact that it would be inequitable for it to receive the benefit of Bank of America's payment of the checks for \$185,156.01 and yet prevent Bank of America from offsetting these payments against the credit to which Lofendo was entitled by virtue of Merchandise's payment of the four and six checks. Under the law the fact that its position is tainted by this inequity precludes a recovery by it.

VII. BANK OF AMERICA'S POSITION WAS CHANGED BY REASON OF MERCHANDISE'S PAYMENT OF THE FOUR CHECKS AND THEREFORE IT BECAME A BONA FIDE PURCHASER OF THEIR PAYMENT.

We argued this point on pages 58-69 of our opening brief.

1. Merchandise's principal contention so far as this point is concerned is that under the rule of the *Weiner* case Bank of America is not entitled to keep Merchandise's payment of the four checks because it retained such payment as Lofendo's agent until on November 19th it made a book entry charging it against Merchandise's account with it and that at the time it had notice of the claim that the checks were paid by mistake (MB, 20; 76).

This is just another illustration of Merchandise's fundamental fallacy that the checks were not collected and paid until Bank of America made an entry on its books charging them against Merchandise's account and that until such entry was made there was no change in relationship from agency to debtor-creditor. As Merchandise paid the four checks when it on November 12th gave Bank of America credit, and as on that date the agency was terminated and Merchandise became indebted to Bank of America in the amount of the checks, the date on which Bank of America made book entries on Merchandise's account with it is totally irrelevant.

2. However, Merchandise also contends in effect that assuming that Merchandise paid the checks on November 12th, nevertheless under the rule of the

Weiner case Bank of America is not entitled to retain the payment because it did not make "actual application" of the credit by posting it and the charge against it in its books until after it received notice by the Messenger-Estribou conversation of November 17th that Merchandise was claiming that it had paid the six checks by mistake (MB, 16-17; 20-21; 73-74).

(a) As established by our point V, Bank of America is entitled to its right of setoff whether or not the *Weiner* case is applicable.

But assuming for the sake of the argument that the case is to be governed by the rule of the *Weiner* case, nevertheless Merchandise cannot recover.

As pointed out on pages 64-67 of our opening brief, where the intention is that any payment received by an agent for the account of his principal shall *ipso facto* be charged against any indebtedness of the agent to the principal, then under the rule of the *Weiner* case the agent is not required actually to make the bookkeeping entry charging the principal's account in order to become a bona fide purchaser of the payment, but he becomes such upon receiving it whether or not he makes the entry on his books. The intention of the parties, the facts, must control, not the purely fortuitous circumstances whether or not a clerk of the agent has made a bookkeeping entry.

But as when Merchandise paid the four checks on November 12th Bank of America ceased to be Lofendo's agent and became his debtor in the amount of the checks, the situation becomes even clearer.

Then by virtue of the bank-depositor relationship, the credit to his account to which Lofendo then became entitled was offset by the debits thereto created by Bank of America's payment of the checks for \$109,569.15 and \$75,586.86; and this would have been the result whether or not any bookkeeping entries had been made.

(b) But if it be assumed that under the rule of the *Weiner* case Bank of America could not become a bona fide purchaser of the payment of the four checks unless it prior to the Messenger-Estribou conversation of November 17th actually took action in reliance on the advice of credit for the four checks, the stipulated facts in the record show that it took such action by putting the checks for the \$75,586.86 in the counter work and crediting the account with the \$89,813.10, all on November 17th. See pages 60-67 of our opening brief.

Merchandise claims that LeRoy's testimony that Duncan told him in their conversation of November 18th that Estribou had said that there was a balance of \$690.00 odd in the account shows that the \$89,813.10 was not credited to the account on November 17th (MB, 20-21). LeRoy testified that Duncan told him this after Duncan's first conversation with Estribou in the morning of the 18th (II, 452-455). But there is nothing inconsistent between the stipulation that the \$89,813.10 was credited to the account on November 17th (IV, 1182; 1183) and this hearsay on which Merchandise relies. When on the morning of Novem-

ber 18th Estribou was talking with Duncan, he doubtless had before him the ledger sheet of the account before the credit had been posted and which, therefore, showed the balance of \$699.02. But in any case the stipulation that on November 17th the checks for \$75,586.86 were put in the counter work and that on that day the account was credited with the \$89,813.10 must control.²²

3. There can be no doubt that under the rule of the *Weiner* case Bank of America became a bona fide purchaser of Merchandise's payment of the four checks.

²²Merchandise says that Messenger in his conversation with Estribou of November 17th assumed that Bank of America had already paid out funds and changed its position in reliance on the \$89,813.10 advice of credit, and that consequently Merchandise did not mention this advice of credit then or in the conversations of November 18th (MB, 23-24). And it also says that "Before telephoning, Mr. Messenger had been told by plaintiff's general counsel that an advice of credit could be revoked if not acted on" (MB, footnote 24).

This is an incorrect statement of the testimony. Messenger testified on cross-examination that prior to his conversation with Estribou his counsel had told him that his opinion was that "if the advice of credit [the advice for the six checks] had not been received by the Bank of America, we would rescind our credit" (I, 257).

It would have been most extraordinary if the opinion of Merchandise's counsel on November 17th given on the spur of the moment when Merchandise had just discovered that something was wrong in the United account and before any controversy with Bank of America had arisen should have corresponded to the technical, abstruse and erroneous views developed by Merchandise's counsel during the course of this litigation.

VIII. BANK OF AMERICA'S POSITION WAS CHANGED BY REASON OF MERCHANDISE'S PAYMENT OF THE SIX CHECKS AND THEREFORE IT BECAME A BONA FIDE PURCHASER OF THEIR PAYMENT.

We argued this point on pages 69-72 of our opening brief.

We make the same answers to Merchandise's claims respecting it as our answers to its claims respecting the four checks except that it is true (1) that Messenger told Estribou that Merchandise was claiming that it had paid the six checks in error, and (2) that Bank of America did not act upon the advice of credit for the six checks until after the Messenger-Estribou conversation.

Stated briefly, our position is this: If Bank of America's agency for Lofendo had continued after Merchandise's payment of the six checks on November 15th, and if therefore the rule of the *Weiner* case were directly applicable, then the credit to the account created by the payment would have offset automatically the debits to the account created by the payment of the checks. The undoubted intention of Lofendo and Bank of America that all credits should be offset by debits would have to be given effect whether or not bookkeeping entries were made. But as Bank of America's agency for Lofendo for the collection of the checks was terminated by their payment, and as at that time a creditor-debtor relationship between them was established, any doubt respecting the point is obviated—the debits were *ipso facto* offset by the credit. And so Bank of America's position was changed by the payment of the six checks, and it became a bona fide purchaser of the payment.

IX. MERCHANDISE IS PRECLUDED FROM RECOVERING THE PAYMENT (1) BECAUSE IT WAS NEGLIGENT IN MAKING THE PAYMENTS, AND (2) BECAUSE SUCH NEGLIGENCE WILL CAUSE BANK OF AMERICA PREJUDICE IF MERCHANDISE IS ALLOWED TO RECOVER.

We argued this point on pages 102-107 of our opening brief.

As the trial court did not find respecting the issue whether Merchandise was negligent, it must be assumed, so far as this point is concerned, that it was negligent (OB, 72-73). But so that this court could have the picture we reviewed the uncontradicted evidence showing that the manner in which Merchandise conducted its account with United was so astounding, so flagrantly bad, that one can infer that one or more of its officers or employees knowingly permitted the kite to continue (OB, 75-89). Merchandise says that it will not consider our discussion of this evidence because the issue is irrelevant (MB, 107).

1. Merchandise's claim that its negligence is irrelevant because under the law a payor is not precluded by his negligence from recovering a payment made by mistake.

Merchandise says that Bank of America argues that a payor cannot recover on the ground of mistake, if the mistake was due to his negligence; and that "this is not the law" (MB, 70).

Now Bank of America did not make the statement which Merchandise says it made. On the contrary, Bank of America stated that the authorities cited by it laid down the rule that "if the mistake inducing the payment was due to the negligence of the payor, and *if its recovery will cause prejudice*, the payor

cannot recover'' (OB, 103-104). Bank of America made it clear that under the law the two elements must concur: negligence of the payor and prejudice to the payee. Merchandise in saying that Bank of America contended that negligence alone will bar recovery entirely misstates Bank of America's position.

2. Merchandise's contention that its negligence did not cause Bank of America prejudice.

Merchandise's mistake consisted in paying the four and six checks in the belief that the Lofendo remittance checks were bona fide when in fact they were part of the kite. Its mistake was certainly due to its gross negligence.

But Merchandise says that its negligence in not discovering the kite did not cause Bank of America any prejudice; that Bank of America suffered the loss which it will suffer if Merchandise recovers in this case because it gave Lofendo immediate credit for the checks for \$97,207.00 against which the checks for \$109,569.15 were charged and that it paid the checks for \$75,586.86 by not rejecting them in time (MB, 112-113). The answer is that if all these checks had been bona fide and not part of the kite, Bank of America would have suffered no loss in paying the checks for \$109,569.15 and \$75,586.86. The kite will cause Bank of America its loss if Merchandise is allowed to recover; just as the kite will cause Merchandise the loss if it fails to recover. Merchandise is perfectly willing to say that its mistake in making the payments was due to the kite. It is perfectly will-

ing to say that Bank of America was negligent in permitting the kite to go on. But it does not want to talk at all about its own negligence; it wants to shun all discussion of its responsibility for the continuance of the kite. But it cannot shun this responsibility. Its behavior in allowing the kite to continue is a vital part of this case.

These facts are indubitable: (1) that Merchandise's mistake in making the payments was due to the kite and the continuance of the kite was due to its negligence; (2) if Merchandise is allowed to recover, Bank of America will suffer prejudice because of the kite to the tune of \$174,192.34 plus interest.

It follows that under the law Merchandise cannot recover, and that this is so regardless of all the other points involved in this case.

3. Merchandise's claim that Bank of America's contention based on Merchandise's negligence is a counterclaim.

Merchandise also argues that Bank of America's contention that Merchandise's negligence precludes its recovery is not a defense, but a counterclaim, that is, a claim by Bank of America to recover damages from Merchandise because of its negligence in permitting the kite to continue; that Merchandise owed Bank of America no duty to exercise care to prevent the kite; that, therefore, Bank of America cannot recover on its counterclaim; and that consequently Merchandise's negligence is irrelevant and the trial court was not obliged to find with respect to it (MB, 35; 99-103; 104-107).

But so far as the point under discussion is concerned, Bank of America is not seeking to recover damages for Merchandise's negligence. It is seeking to prevent Merchandise from recovering its payments on the ground that under the law a payor cannot recover a payment made by mistake arising out of its negligence when such negligence will cause the payee prejudice if a recovery is allowed. The contention, therefore, is a defense, not a counterclaim.

4. Merchandise's contention that Bank of America was guilty of contributory negligence.

Merchandise says that if Bank of America were attempting to recover damages from Merchandise for its negligence, Bank of America would be precluded from recovering because of its contributory negligence (MB, 103-104).

Strangely enough the trial court made a finding that Bank of America was negligent, but refused to find with respect to Merchandise's negligence. As Merchandise is seeking to maintain what is in substance an equitable action to recover money paid by mistake, its negligence is certainly more relevant than the alleged negligence of Bank of America.

As pointed out on pages 89-95 of our opening brief, the trial court's finding that Bank of America was negligent is not supported by the evidence.

But as this claim of Bank of America is a defense, not a counterclaim for damages for negligence, the rule relating to contributory negligence is irrelevant. The rule which is applicable is the rule that "where

one of two innocent parties must suffer, the burden should be borne by the one whose action was the primary cause of the loss" (OB, 105-106). There cannot be any doubt whatever which of these two banks was the primary cause of the loss; it was Merchandise (OB, 106).

Furthermore, *Wells Fargo Bank v. Bank of Italy*, 214 Cal. 156, 163, 4 P. (2d) 781, 784, states the equitable maxim as follows:

"* * * where the parties are equally innocent the law will leave the loss where they have placed it."

Section 3524 of the *California Civil Code* provides:

"Between those who are equally in the right, or equally in the wrong, the law does not interpose."

To sustain the position of plaintiff, Merchandise, this Court must interpose to require a repayment by Bank of America of money paid by Merchandise. If we make the totally unjustified assumption that Merchandise was just as innocent as and no more at fault than the Bank of America, the law will leave the loss where it finds it and will not shift it from one of them to the other.

5. Merchandise's contention respecting its wire of October 22nd and letter of September 22nd.

Merchandise says that it did not by this wire and letter misrepresent to Bank of America United's credit and standing, and that Bank of America did not rely upon them in paying Lofendo's checks (MB, 110-112).

No amount of sophistry can disguise the facts that the wire and letter were representations that United was worthy of credit and was conducting its business on sound lines; that the representations were false; and that Bank of America relied on them (OB, 93-99).

X. THE TRIAL COURT ERRED IN NOT FINDING WITH RESPECT TO THE ISSUE WHETHER MERCHANDISE WAS PARTICIPATING IN UNITED'S FRAUD.

We made this point on pages 107-108 of our opening brief.

Merchandise's reply to it is that Bank of America's "pleadings made no such absurd charge that plaintiff conspired with United to defraud defendant" (MB, 108).

Bank of America's second separate defense and counterclaim alleges that United and Lofendo by carrying on the check kiting were fraudulently representing to Bank of America that the checks used in the kite represented bona fide payments, whereas such checks were fictitious; that United and Lofendo made these representations to Bank of America to induce it to pay Lofendo checks; that if Merchandise is permitted to recover Lofendo's account will be overdrawn; that in that event Bank of America will have been induced to extend credit to Lofendo in the amount of such overdraft by such fraud of Lofendo and United (I, 38-39); and then it alleges:

"If as defendant is informed and believes, plaintiff about October 1, 1948, had knowledge

of said check kiting and did not put a stop to it, plaintiff from that time to November 17, 1948, when said check kiting came to an end was in effect participating in said fraud perpetrated on defendant by United Produce Company and Lofendo" (I, 45).

Merchandise says that "There is not a scrap of evidence to support a claim that plaintiff was a co-conspirator with United" (MB, 108). The answer is that one cannot read the astounding facts disclosed by this record (OB, 74-87) without inferring that at least one of the officers or employees of Merchandise knew that United was engaged in a kite and permitted it to go on. And under elementary principles (OB, 107), if one such officer or employee with knowledge permitted the kite to go on, Merchandise as alleged in Bank of America's pleadings, was in effect participating in the fraud and became liable for whatever damages Bank of America may have suffered because of it.

XI. THE TRIAL COURT'S FINDING THAT BANK OF AMERICA ENTERED INTO A CONTRACT THAT IT WOULD NOT ACT UPON THE ADVICE OF CREDIT WITH RESPECT TO THE SIX CHECKS WHEN RECEIVED IS NOT SUPPORTED BY THE EVIDENCE, BUT SUCH AGREEMENT, IF MADE, WAS VOID AND UNENFORCEABLE.

1. The findings are not supported by the evidence.

We discussed this point on pages 108-117 of our opening brief.

Merchandise's reply is the arbitrary assertion that the evidence stated in our opening brief supports the finding (MB, 60).

We submit that the evidence shows no intention of the officers engaged in the conversations to enter into a contract, but only a willingness of Bank of America to follow instructions being given it by Merchandise on the basis that Merchandise had sent out the advice of credit by error and was therefore rescinding it.

2. **Assuming a contract, it was invalid because not supported by a consideration.**

We discussed this point on pages 117-118 of our opening brief.

Merchandise's answer is that "if obligations arose on November 15th, as defendant claims, the mutual release of those obligations was consideration, each for the other" (MB, 60). This obscure statement means that if when Merchandise granted the credit for the six checks on November 15th Merchandise became indebted to Bank of America, it could only be because Bank of America had assumed Merchandise's obligation to Lofendo in consideration of Merchandise's agreement to pay Bank of America (Merchandise makes a detailed statement of this contention on pages 35 and 56-57 of its brief); and that the alleged agreement by Bank of America to release Merchandise from its liability to Bank of America was supported by Merchandise's agreement to release Bank of America from the latter's agreement to assume Merchandise's obligation to Lofendo.

Bank of America denies that Merchandise, when it gave its credit to Bank of America, was under any obligation to Lofendo; and denies that Bank of America ever assumed any such obligation of Merchandise to Lofendo. And Merchandise denies that Bank of America made any such agreement (MB, 59). Obviously a hypothetical agreement which both parties say was not made could not possibly be a consideration for the alleged contract of Bank of America to release Merchandise from its liability created by the credit.

But Merchandise's suggestion that it upon the granting of the credit might have assumed an obligation to Lofendo and Bank of America might have agreed to assume such obligation to Lofendo is based upon the same basic fallacy which vitiates Merchandise's other arguments.

When Bank of America as Lofendo's agent for the collection of the checks instructed Merchandise, as it was authorized to do by section 16c, to pay the checks by granting the credit and when Merchandise pursuant to these instructions granted the credit the checks were collected and paid as though Merchandise had paid cash to Bank of America (*supra* pp. 17 to 28); and when these acts took place, Merchandise did not undertake any obligation to Lofendo and Bank of America did not agree to assume any obligation of Merchandise to Lofendo. And so Bank of America's alleged contract to release Merchandise from Merchandise's indebtedness to it created by the credit cannot be supported by Merchandise's agree-

ment to release Bank of America from an agreement Bank of America never made (that is an agreement by Bank of America to assume Merchandise's alleged obligation to Lofendo).

In *Bard v. Kent*, 19 Cal. (2d) 449, 122 P. (2d) 8, the court, in holding that the payment by a lessee of architect's fees for plans relating to improvements to the premises was not a consideration for an agreement of the lessor giving the lessee an option to extend the lease said:

"There is no doubt that such payment would be consideration for an option if the offeror agreed to accept it as such (citing cases). No act of an offeree, however, can constitute consideration binding upon the offeror unless the latter agrees to be bound in return therefor (citing cases). In the words of the Restatement of Contracts (Sec. 75): 'Consideration must actually be bargained for as the exchange for the promise * * * The fact that the promisee relies on the promise to his injury, or the promisor gains some advantage therefrom, does not establish consideration without the element of bargain or agreed exchange.' "

In *Fire Insurance Association v. Wickham*, 141 U.S. 564, 12 S. Ct. 84, the court, in holding that the repayment of losses by insurance companies was not a consideration for an agreement by the insured to accept less than the amount due him, said:

"* * * That prepayment of part of a claim may be a good consideration for the release of the residue is not disputed; but it is subject

to the qualification that nothing can be treated as a consideration that is not intended as such by the parties. * * * To constitute a valid agreement there must be a meeting of minds upon every feature and element of such agreement, of which the consideration is one. The mere presence of some incident to a contract which might, under certain circumstances, be upheld as a consideration for a promise, does not necessarily make it the consideration for the promise in that contract. To give it that effect, it must have been offered by one party, and accepted by the other, as one element of the contract."

See, also, *Williams v. Hasshagen*, 166 Cal. 386, 137 P. 9; *In re Dutton's Estate*, 37 A. 583, 181 Penn. 426; *Yuma National Bank v. Balsz*, 237 Pac. 198, 28 Ariz. 336; and *Restatement, Contracts*, sec. 74, pp. 81, 82.

If we make the totally unjustified assumption that the effect of the alleged agreement arising out of the conversations of November 17th and 18th was to release Bank of America from its supposed agreement to assume Merchandise's supposed obligation to Lofendo, still such release of Bank of America cannot be considered consideration for Bank of America's alleged release of Merchandise from its liability created by the credit because such release of Bank of America was not bargained for as the exchange for its alleged promise; that is there can be no pretense that it was offered by Merchandise and accepted by Bank of America as consideration for the latter's alleged promise.

3. Assuming a contract, it was invalid because based on mistake.

We argued this point on pages 118-119 of our opening brief.

Merchandise's answer is that the "impression" of Bank of America's officers when the conversations of November 17th and 18th took place that there was a black balance in Lofendo's account "was not based on anything said by plaintiff," and that no mistake justifying the rescission of the agreement was made because the officers of Bank of America knew that the Branch might not be in the clear and were doubtful of Bank of America's position but made the agreement anyway (MB, 61-62).

It makes no difference that the belief of the officers of Bank of America that there was a good balance in the account was not based on anything said by Merchandise. A party may base his rescission on a mistake made by him alone; there is no requirement that the mistake be mutual or that it be induced by the representation of the other party. *California Civil Code*, Sec. 1577; *Palace Hardware v. Smith*, 134 Cal. 381, 384, 66 P. 474, 476; *Lepper v. Ratterree*, 98 Cal. App. 245, 255, 276 P. 1037, 1041. Furthermore, the mistake in this case was mutual because Merchandise was told that there was a credit balance in the Lofendo account.

And the record shows conclusively that all the men involved in the transaction believed that there was a good balance in the account (OB, 118-119).

It is true that Duncan testified that after Johnson had finished his telephone conversation with Estribou, he reported to Duncan and LeRoy that "everything was in the clear and it looked perfectly all right;" and that Johnson also said that Estribou had stated that although the account looked in the clear at the moment, "there were so many items in transit that anything could happen" (II, 549).

The items in transit to which Duncan referred were checks drawn by Lofendo on the account, not checks which had been credited to the account and were uncollected. Checks in transit drawn by Lofendo on the account could not put it in the red unless paid by the Branch; and certainly Estribou did not contemplate that the Branch would pay checks drawn on the account if there were not sufficient funds in the account to pay them. Estribou believed, as he told Messenger, that the Branch had not been paying against uncollected funds (I, 374). And when on November 18th Duncan, after the conclusion of his conferences with LeRoy, wrote Estribou his letter of that date he congratulated Estribou for keeping his Branch in the clear (Plaintiff's Exhibit 11; IV, 1174a). In the light of this letter it cannot be suggested that Johnson's statement to Duncan respecting what Estribou had said concerning items in transit raised any doubt in Duncan's mind whether the Branch was in the clear.

Furthermore, it is impossible to believe that the Bank of America officers would have consented that

Merchandise could rescind the credit if they had not believed that there was a credit balance in Lofendo's account. No one can think for a moment that they were prepared to give Merchandise a large sum of their bank's funds.

The authorities cited by Merchandise (MB, 62) are not in point. In *Cleveland-Cliffs Iron Co. v. East Itasca Mining Co.*, 146 Fed. 232, the court held that the plaintiff could not recover payments made by it to defendant for an assignment of two mining leases on the ground that the ore was not up to the standard indicated by its previous tests and that therefore the amount it paid was excessive. In *McGregor v. Millar*, 166 Kan. 657, 203 P. (2d) 137, 140, the court held that the plaintiff could not recover a payment made by him to settle a controverted claim when he discovered later that the facts were not what he believed them to be. In the case at bar, Bank of America is not seeking to recover a payment made by it in purchasing property of doubtful value or made by it to settle a claim; but it is seeking to avoid an alleged contract on the ground that its alleged consent thereto was induced by a mistake respecting a material fact.

Merchandise's contention (MB, 62; footnote 28) that Bank of America's mistake was not material, that it did not go to the substance of the transaction, is fully answered by what we said on pages 120-121 of our opening brief and the case there cited, *Hannah v.*

Steinman, 159 Cal. 142, 146-149, 112 P. 1094, 1096-1097.²³

4. **Assuming a contract, it was induced by Merchandise's fraud.**

We argued this point on pages 121-123 of our opening brief.

Merchandise says that the representations of Messenger and LeRoy that the advice of credit had been sent out in error, that a clerk had mailed it by mistake, were true (MB, 63). They were not (OB, 121).

Merchandise also says that LeRoy told Duncan "that plaintiff had discovered a kite and informed him of the very occurrences which defendant now relies on as showing such negligence" (MB, 63). LeRoy testified that he told Duncan that Merchandise had "uncovered a large scale kiting operation" (II, 543 and 547) and that Merchandise upon checking United's books had obtained a satisfactory answer to its questions (II, 634); but he did not state or suggest to Duncan any of the facts showing that Merchandise by the grossest sort of negligence had permitted the kite to continue. To suggest that he did is simply not true. He implied to Duncan just the opposite (II, 634).

²³The *Hannah* case was followed in several later cases, including *Alberti v. Jubb*, 204 Cal. 325, 328, 267 P. 1085, 1087; *Security Trust and Savings Bank v. Southern Pacific Co.*, 214 Cal. 81, 85, 3 P. (2d) 1015, 1017, and *Estate of Barton*, 96 Cal. App. (2d) 234, 239, 214 P. (2d) 857-860.

XII. MERCHANDISE'S CONTENTION, THAT AS UNITED COULD NOT COMPEL MERCHANDISE TO PAY UNITED'S CHECKS BANK OF AMERICA CANNOT RETAIN THEM, IS ENTIRELY IRRELEVANT.

Merchandise maintains that as United was using the Lofendo account to carry on the kite and as United by carrying on the kite by means of the Lofendo remittance checks was fraudulently inducing Merchandise to make it loans and pay its checks, Merchandise could recover from United payments made to it on account of its checks; and then Merchandise asserts repeatedly that it can recover its payments of the four and six checks from Bank of America because Bank of America had no better rights than United (MB, 4-6; 31; 41; 47; 49-50).

The argument is entirely irrelevant. Merchandise cannot recover the payments from Bank of America for the reasons stated in our opening brief and this brief. Bank of America stands on its own rights, rights that are certainly different from any that could be asserted by Lofendo and United and not derived in any way from them.

XIII. MERCHANDISE'S CHARGES AGAINST BANK OF AMERICA ARE ENTIRELY UNWARRANTED AND UNTRUE.

1. Merchandise asserts that Bank of America "decided" to charge Merchandise's account with it with the \$89,813.10 after learning on November 18th that the checks for \$97,207.00 had been rejected; it says that Bank of America made this charge with "crass motives" and surreptitiously (MB, 18-20; 24-25).

The putting on November 17th of the checks for \$75,586.86 into the work and the crediting of the account with the \$89,813.10 (Plaintiff's Exhibit 14; IV, 1182-1183) took place before the Branch learned late in the evening of November 18th that Merchandise had rejected the checks for \$97,207.00. The making of the entries at Bank of America's head office charging Merchandise's account followed as a matter of course. These acts would have taken place just as they did take place if no controversy of any sort had arisen.

And so Merchandise's assertion, that Bank of America did not decide to enter the charge until it learned of the rejection of the checks for \$97,207.00 and that when it did make the entry it was acting with improper motives and in an improper manner, is just pure and simple hokum.

2. And so is its charge that Bank of America in crediting Lofendo's account with the amount of the six checks and charging the checks for \$97,207.00 was acting with the "crassest motives" and seeking to "rob" Merchandise (MB, 10-11). Accepting as true Messenger's testimony, still he admitted that Estribou's willingness to follow his instructions, that the advice was rescinded and not to enter the credit, was based on Estribou's mistaken belief that the branch had not been paying against uncollected funds and that the account was in the black. When Bank of America discovered its mistake it certainly had the legal right, and also the moral right, to change its mind. It is preposterous to say that it was robbing Merchandise by

doing so. The shoe is on the other foot. When Merchandise seeks, as it is doing, to take advantage of Bank of America's mistake, its moral position is indefensible. And it should not be forgotten that it by its own gross negligence permitted the kite to continue and by falsely representing United's credit and standing induced Bank of America to continue to pay Lofendo checks.

XIV. CONCLUSION.

No matter how Merchandise attempts to disguise the fact, it is nevertheless true that it is attempting to recover from Bank of America part of the loss which it brought upon itself by permitting the kite to continue.

It has neither the moral nor the legal right to recover.

Dated, San Francisco, California,
February 14, 1952.

Respectfully submitted,

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No. 13, 039

IN THE

United States
Court of Appeals

For the Ninth Circuit

BANK OF AMERICA NATIONAL TRUST AND
SAVINGS ASSOCIATION, a National Banking
Association, and EUGENE J. O'RILEY, as
Trustee, in Bankruptcy of the Estate of
UNITED PRODUCE COMPANY, a corporation,
Bankrupt,

vs.

MERCHANDISE NATIONAL BANK OF CHICAGO,
a National Banking Association,

Appellants,

Appellee.

Appellee's Supplemental Memorandum
Commenting on Appellant's Reply Brief

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SUBJECT INDEX

	Page
1. The Findings.....	1
2. Identify of Lofendo and the Fact of Fraud.....	1
3. Ownership of the Checks.....	2
4. Plaintiff Not Defendant's Agent.....	2
5. The Contractual Arrangement Proved and Found.....	2
6. Payment a Secondary Question.....	3
7. There Were No Proceeds of the Checks.....	5
8. Defendant Has Only Such Rights as It Derived from Lofendo, Who Had None.....	5
9. Quarrel with the Findings.....	8
10. Defendant Maintained No Deposit Account with Plaintiff.....	9
11. Abandonment of Counterclaims for Negligence and Absence of Issue of Participation in Conspiracy.....	11
Conclusion	12

TABLE OF AUTHORITIES CITED

CASES	Pages
Commercial National Bank v. Armstrong, 148 U.S. 50.....	2
Estep v. United States, 140 F.2d 40 (10 Cir.).....	12n
Luckehe v. First National Bank, 193, Cal. 184.....	10
Truck Drivers Local No. 421 v. United States, 128 F.2d 227, 235 (8 Cir.)	12n
United States v. Gerle, 125 F.2d 243 (3 Cir.).....	12n
United States v. Potash, 118 F.2d 54 (2 Cir.), cer. den. 313 U.S. 584..	12n
Weiner v. Roof, 19 Cal.2d 748.....	7

STATUTES

California Bank Act, Section 16(c).....	9, 10
Illinois Negotiable Instruments Law, Section 207(a).....	4

No. 13,039

IN THE

United States Court of Appeals

For the Ninth Circuit

BANK OF AMERICA NATIONAL TRUST AND
SAVINGS ASSOCIATION, a National Banking
Association, and EUGENE J. O'RILEY, as
Trustee, in Bankruptcy of the Estate of
UNITED PRODUCE COMPANY, a corporation,
Bankrupt,

vs.

Appellants,

MERCHANDISE NATIONAL BANK OF CHICAGO,
a National Banking Association,

Appellee.

Appellee's Supplemental Memorandum Commenting on Appellant's Reply Brief

The essence of defendant's reply brief is that it ignores *this case*. For example:

1. The Findings.

The findings are never mentioned.

2. Identity of Lofendo and the Fact of Fraud.

Defendant ignores the fact that "Lofendo" and United Produce Company were identical, and that because of the fraud "United Produce-Lofendo" never acquired any rights against plaintiff.

3. Ownership of the Checks.

Defendant ignores the fact that it never became the owner of the checks, having taken them only as agent for collection.

It ignores the fact that the use of a collection letter instead of a cash letter informed plaintiff that defendant was not the owner, and that the transaction between plaintiff and defendant did not proceed on the assumption that defendant was.

4. Plaintiff Not Defendant's Agent.

Defendant ignores the fact that under the Massachusetts rule, which governs this case, plaintiff was not defendant's agent and owed no duty to it. Plaintiff's duty lay to "Lofendo," and because "Lofendo-United" was a defrauder, there was no duty at all.

For example, defendant cites a case which it states it had not found before, *Commercial National Bank v. Armstrong*, 148 U.S. 50. There the New York rule governed, and the collecting bank was the agent of the forwarding bank. Its duties were therefore to the forwarding bank and not to the latter's customer, as here. The court emphasized the particular contractual arrangement there proved as existing between the two banks whereunder the collecting bank was permitted to mingle collected funds with its own and to assume a debtor instead of an agent relationship to the forwarding bank (p. 58). In turn the collecting bank was the principal of other banks which were its agents.

5. The Contractual Arrangement Proved and Found.

Defendant ignores the contractual arrangement *proved in this case*. To escape the fact that the cases relied on by it are cash letter cases, it says (p. 37) that none of them remarked that a cash letter was used but merely showed that credit had been initially given by the forwarding bank to its customer. But when we labeled the cases as "cash letter cases" we did so as a short-hand way of describing them as cases in which initial credit had

been given, from which other consequences followed. Because a forwarding bank has given credit, it either has become the owner of the paper, or it so appears to all successive banks in the collection chain, and the banks treat with each other upon that assumption (see our brief, p. 91). In a collection letter case the forwarding bank has not become the owner, and the form of document used so informs all other banks. Necessarily the contractual arrangement between the forwarding and collecting banks is different.

Defendant argues (R. Br. 15) that the advices of credit were not necessary parts of the transactions but only evidence. There *can* be contractual arrangements where that is true. Cash letter cases are examples. But a collection letter case is not. The nature of the contractual arrangement is one of fact. The findings in this case are against the defendant.

We have shown that the findings as to the meaning of the collection contract are supported by the practical construction of the parties (Our brief, p. 83). Defendant addresses itself to but part of the facts. It argues that what the parties did on November 17th and 18th was not a construction of the contract (R. Br. 34) because the parties did not mention "contract".

But, obviously, the parties were construing their rights and duties under the collection arrangement. When defendant's head office wrote its branch that it must obey the plaintiff's instructions, it construed its duties to the plaintiff and to its customer Lofendo. The collection arrangement was a contract, and so the parties were giving a practical construction of that contract.

6. Payment a Secondary Question.

Defendant assumes that the question in the case is whether the checks were "paid", ignoring the different senses in which the term "payment" is used and the fact that payment or non-payment is a preliminary question. Bank collections may give rise to

various problems as between various parties, and what may be payment for one purpose is not for another.

The artificiality of the argument that the checks were paid is shown by defendant's statement (R. Br. 46) that when the payment was made the agency ceased and "Merchandise became indebted to Bank of America in the amount of the checks." If paid, plaintiff would not still be obligated to anyone upon them. Obviously what defendant really means is not that the plaintiff paid the checks by what happened in Chicago but that it became obligated to pay them.

But this is tantamount to saying that plaintiff "accepted" the checks and answers defendant's argument under Section 207(a) of the Illinois Negotiable Instruments Law.

Our brief showed that Section 207(a) gives defendant no support, because failure to reject within the described time at most would only be equivalent to acceptance, not payment, and left plaintiff with all defenses appropriate when acceptance has resulted from fraud.*

Defendant asserts that if retention is equivalent to acceptance and not payment, "no one would be more astonished than the bankers of this country" (R. Br. 5). On the contrary such statutes are referred to as establishing an "acceptance by retention rule".

A simple consideration suffices to show that retention beyond a described period is at best "acceptance" and not "payment". The statute applies equally whether the check comes through the mail directly from the payee or from a forwarding bank. Had the checks come by mail from "Lofendo" it would be absurd to say that he was "paid" by the retention, for he got nothing. So also, the statute applies equally whether the collecting bank has a deposit account with the forwarding bank or not. So here, if plaintiff had had no deposit account with defendant, the only

*Defendant counters that a check does not operate as an assignment from maker to payee. True, but the assignment results from the check plus the acceptance by retention.

way the latter could assert any rights against plaintiff on the basis of the retention would be to sue, i.e., to allege that plaintiff had become obligated to pay. But "obligation to pay" is "acceptance" and is subject to being defeated by fraud, mistake or other equities.

7. There Were No Proceeds of the Checks.

Repeatedly defendant's arguments rest on the assumption that there were "proceeds" of the 6 and 4 checks (e.g., Br. 15, 24, 26, 28), citing cases where a collecting bank had actually collected money from another (see our brief, p. 98).

But here no funds were collected. There were no "proceeds". United Produce had no funds in its account, and it (i.e., Lofendo) could not have compelled plaintiff to honor the checks.

For example, to avoid the effect of our demonstration that plaintiff could have become liable to it only on the basis of a contract between them requiring consideration (Our brief 56), defendant argues that plaintiff became liable to it because plaintiff obtained "proceeds" (pp. 24, 29). This savors of a money had and received theory. But plaintiff obtained no proceeds. And even if it had, they were not proceeds which belonged to the defendant, for the defendant was not the owner of the checks.

8. Defendant Has Only Such Rights as It Derived from Lofendo, Who Had None.

Since Lofendo had no rights against plaintiff, defendant is compelled to deny that it derived whatever rights it has through him (R. Br. 67). But analysis of its arguments shows that they all rest on Lofendo's rights.

Basically defendant rests on an odd assertion that it became a "bona fide purchaser of a right of set-off" (e.g., R. Br. 41-46).

The assertion must be analyzed to be understood. To be a bona fide purchaser one must at least buy something from another. Who owned a right of set-off which defendant bought? Obviously no one. And when defendant says that it became a bona fide pur-

chaser, does it mean that it paid out money or incurred any liability to anyone in reliance on an assumed liability of plaintiff to it? Obviously, no. The findings are otherwise and are not assailed.

And what is being set off against what? Defendant says (R. Br. 42) that when a depositor becomes indebted to a bank, the bank "acquires the right to offset such indebtedness of its depositor against any credits to which he is entitled." Does this mean any credits the depositor has against the world? Obviously not.

What defendant does seem to mean is that it had a right to set off against any sums it owed Lofendo any sums he owed to it. Now (1) this has nothing to do with bona fide purchase of anything, and (2) in order to become pertinent to plaintiff, defendant must somehow involve plaintiff in a liability of its own to Lofendo. In other words, defendant assumes, not only that it had a liability to Lofendo, but that such liability was a correlative of a liability of plaintiff to defendant. This it reveals when it says (R. Br. 42, 49) that "Lofendo became entitled to credits". What credits? Defendant means such credits as Lofendo had, based on the 6 checks and the 4 checks. But Lofendo had no rights because he was United Produce, and United Produce had no rights arising out of the 6 checks or the 4 checks because of its fraud.

At the base of all defendant's arguments lies this assumption, that it became absolutely liable to Lofendo on the 4 and 6 checks the moment plaintiff made entry on its internal books in Chicago. In short, defendant rests its case on "Lofendo's" rights, as necessarily it must do, since "Lofendo" was the payee.

This is again demonstrated by an argument (R. Br. 30) where it tries to avoid the effect of its practice of not charging plaintiff's account until receipt of an advice of credit and subsequent instructions from the branch. It argues that if Lofendo had asked for credit after an advice of credit had been received, it could not have declined to advise the head office to charge plaintiff's account.

But Lofendo's only right would be to recover such damages as he suffered by defendant's failure to complete the duties it assumed as agent under the collection contract. But since Lofendo and United Produce were one and were defrauding plaintiff, Lofendo would suffer no loss by reason of defendant's refusing to charge plaintiff and credit him.

Contrast this argument with what defendant states elsewhere in its brief, e.g., pp. 34, 68. There it argues that when it agreed with plaintiff on November 17th and 18th not to enter credit to Lofendo, it did so only in the belief that it, the Bank of America, was in the clear. But this is a frank avowal that defendant recognized then and recognizes now no duties or obligations to Lofendo. Had it such a duty, it would be irrelevant whether it was in the clear or not.

Thus in one breath it rests its rights against plaintiff upon its duties to Lofendo. In the next it asserts that it had no duties to him. Of course it had none to him, in view of his fraud upon the plaintiff. Had he seen fit to sue defendant, it could have interpleaded plaintiff here.*

A bank may offset what it owes a depositor against what he owes it. Doubtless this offset may be claimed against anyone who derives his rights to the credits *from and under* the depositor. But no automatic offset exists to cut off someone whose rights are not derived from or under the depositor but are *superior* to him, as here. *Weiner v. Roof*, 19 Cal.2d 748 (our brief, pp. 55 and 75).

In an effort to avoid the principles stated in *Weiner v. Roof* (our brief, p. 65, et seq.), defendant asserts that that case applies to payments to an agent, and that when plaintiff "paid" the

*At the trial defendant's Branch Manager admitted that "Mr. Lofendo's rights and [the defendant's] duty to Lofendo did not pop into [its] head until [it] had decided to protect [its] own loss by taking the \$113,000." (R. 422) And it was testified that so long as defendant believed that the account was in the black it had no concern for alleged rights of Lofendo (R. 420-423), and its counsel advised—correctly—on November 18th that Lofendo had no rights in the premises (R. 421).

checks defendant ceased to be Lofendo's agent and became his debtor (R. Br. 48). Assuming that the checks were "paid," whatever the contract was between Lofendo and defendant whereby it could change its position from agent for him to debtor to him, the fact is that the plaintiff "paid" to defendant as *an agent of Lofendo*. The checks had come to the plaintiff through a "collection letter" which informed it that the defendant was not handling the checks for a depositor in a debtor-creditor relationship but as a special situation on an agency basis. If, as between themselves, Lofendo and defendant could change their relationship no such change could cut off plaintiff's rights. They could be cut off only by actual application before notice (see our brief, p. 74).

9. Quarrel with the Findings.

Defendant then (p. 49) resumes its quarrel with the findings as to the time of application of the \$89,813.10, although it never mentions the findings.

The critical question is: When did defendant take plaintiff's funds, i.e., when did it charge the \$89,813.10 *against plaintiff's account*? That charge occurred November 19th, predated to the 18th (see our brief, p. 20) and defendant had no right to make that charge after notice of the fraud, which it already had.

Defendant never mentions this charge at all. Instead it speaks of the time of *crediting* a like sum *to the Lofendo account*. But that could be pertinent only if there was an estoppel, i.e., only if defendant had paid out money in reliance on the credit and before notice. But that it never did.

In any event, the crediting of the sum to the Lofendo account occurred after notice. Defendant refers to a stipulation which states several things on this subject, i.e., that the \$89,813.10 was "put in the counter work" on November 17th (R. 1181) and that the credit was entered on November 18th (R. 1183). These two

statements are reconciled under the stipulation at R. 861, that the practice was to predate an entry by one day.

Undeniably, the credit had not yet been made when Mr. LeRoy talked to defendant's officers on November 18th (R. 452-455). And Messenger's telephone call had already put defendant on notice on November 17th. The evidence is ample to support the finding. Defendant admits that its branch manager, Estribou, did make a statement on November 18th showing that no such credit had yet been made, but it argues (R. Br. 50) that "doubtless" he had before him the ledger sheet before posting although the credit had been entered. The word "doubtless" shows speculation, and findings cannot be upset by speculation.

Defendant also comments on the time when the charge of \$75,586.86 was "put in the counter work" against the Lofendo account (Br. 50). This is irrelevant, because on November 16th defendant was already bound in this sum by reason of charges and credits entered *in the clearing house*. And no reliance on the advice of credit for the \$89,813.10 had anything to do with it.

10. Defendant Maintained No Deposit Account with Plaintiff.

Defendant's arguments ignore the fact that plaintiff had a deposit account with it but it had none with plaintiff.

Defendant discusses Section 16(c) of the California Bank Act at length (Br. pp. 17-22). This section relates only to cash letter transactions, for it relates to a situation where the forwarding bank has given a credit to its customer. That was not the situation here.*

*While we referred to this section in our own brief we did so merely as corroborating the contractual arrangement between Lofendo and the defendant as demonstrated by the documents under which his account was maintained. His rights could be no greater under a collection letter where he was given no credit than they would have been under a cash letter transaction where he would have been given a credit.

Defendant labors the question whether, when the section speaks of a "credit * * * with any bank designated as a depository by the bank allowing such credit," it refers to designation by the forwarding bank (here defendant) or by the collecting bank (here plaintiff).

That question is irrelevant.* The book entry on which defendant relies is merely the notation on the internal records of plaintiff. But plaintiff *was not defendant's depository*, because defendant had no deposit account with plaintiff.† That is an admitted fact. Plaintiff had not been designated as defendant's depository by anyone (see our brief, p. 59).

This fact also disposes of the argument about *reciprocal accounts* (cf. R. Br. 38, 39). Banks sometimes maintain deposit accounts with each other, so that either may draw checks on the other. No such case here exists. Here the only deposit was that maintained by the plaintiff with defendant.

Defendant argues (Br. 24) that under *Luckebe v. First National Bank*, 193 Cal. 184, if it had accepted "in payment" of the checks something it was not authorized to accept, it would still have become liable to Lofendo. There are two obvious answers: (a) The purpose of Section 16(c) was to make clear that a forwarding bank does *not* become liable to its depositor until whatever it accepts ripens into cash in hand unless what it has accepted is one of the modes of payment authorized by the act. And a credit on plaintiff's books was not one of them. (b) Even before

*We think the Act meant designation by the collecting bank. Prior to 1943 the words "forwarding bank" appeared instead of the words "bank allowing such credit." This was changed by amendment in 1943. Unless there had been a legislative intention to change the meaning, the amendment merely substituted ambiguity for clarity.

†Defendant argues (R. 33) that plaintiff's records in Chicago of its relationship with defendant was not internal because the ledger cards were similar to those kept by defendant in San Francisco. The essential difference is that plaintiff had a deposit with defendant, not vice-versa, and that while the defendant sent copies of its ledger to plaintiff monthly, plaintiff sent no copies of its records to the defendant (see our brief, pp. 85, 86).

Section 16(c) a bank accepting something other than cash did not become liable for the amount of the check as such, but only for such loss as it imposed on its principal by surrendering the check, e.g., by accepting a draft upon a bank becoming insolvent. But here Lofendo would have had no action against defendant, because he was the United Produce, and United Produce suffered no legal loss because it had no legal rights to obtain anything whatever upon the checks drawn on plaintiff.

11. Abandonment of Counterclaims for Negligence and Absence of Issue of Participation in Conspiracy.

Defendant's reply brief does not assert any right to recover against the plaintiff on its counterclaim for negligence (see reply brief, p. 55). It now restricts its position by saying that it raises the issue of negligence only as a defense against the plaintiff's right to recover "payment" for mistake or fraud. It hastens to admit that negligence is no bar to a right of a payor to recover on those grounds. But it asserts that negligence plus prejudice to the other party is a bar (R. Br. 53). But the kind of prejudice required by the law is prejudice resulting from change of position by the recipient *in reliance on the payment* (see our brief, pp. 66, 70, 71).

And defendant never changed its position in reliance on the alleged payment. It is so found (see our brief, p. 30). And defendant's brief does not claim that it did. What it claims as prejudice is not reliance on the alleged payment but damage from plaintiff's alleged negligence. This, however, brings it back to its counterclaim for damages, completely answered in our brief and not touched upon in reply.

In short, defendant's argument simply short-circuits two different ideas.

Defendant urges (R. Br. 57) that the trial court erred in failing to find on an issue whether plaintiff participated in United's fraud, i.e., was a co-conspirator with United in its swindle. *There was no such issue in the case* (see our brief, pp. 107, 108).

Defendant proposed findings which it requested the trial court to make, and they were printed in the record at its request (R. 119-164). It will be seen that it never requested a finding that plaintiff participated in United's fraud. All that it asked was for a finding of negligence (See R. 126-142). Then, after the appeal was taken, it filed in this Court a 27-page "Statement of Points on Which Appellant Intends to Rely on Appeal". Therein it not only did not mention any claim that plaintiff participated in the fraud, but it affirmatively said (p. 26, line 1): "Neither plaintiff nor defendant were participating in United's fraud and they were both innocent of that fraud". And, finally, there is no specification of error on this subject in any of the 15 specifications in defendant's opening brief (pp. 11-14).*

CONCLUSION

It is respectfully submitted that the judgment is correct and should be affirmed.

Dated: March 15, 1952.

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*Defendant's specification of error No. 9 (O. Br. 12) asserts that the trial court erred in not finding with respect to the issue "whether Merchandise either knew of the kite or was guilty of negligence in not discovering it." This merely pertains to negligence. Knowledge of a kite would not be knowledge of a fraud, and even knowledge of a fraud would not be equivalent to participation in a conspiracy to defraud. *United States v. Potash*, 118 F.2d 54 (2 Cir.), cer. den. 313 U.S. 584; *Truck Drivers Local No. 421 v. United States*, 128 F.2d 227, 235 (8 Cir.) ; *Estep v. United States*, 140 F.2d 40 (10 Cir.) ; *United States v. Gerle*, 125 F.2d 243 (3 Cir.).

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Appellants,

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MERCHANDISE NATIONAL BANK OF CHI-
CAGO, a national banking association,

Appellee.

APPELLANTS' REPLY TO
APPELLEE'S SUPPLEMENTAL BRIEF.

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Subject Index

	Page
1. Bank of America does not base its case on Lofendo's rights	1
2. Merchandise's argument that it did not pay the checks but only because obligated to pay them is entirely unjustified	2
3. The credits granted by Merchandise were the proceeds of the checks	3
4. Section 16c of the California Bank Act authorized Bank of America to accept credits from Merchandise in payment of the checks	5
5. Bank of America was in the position of a bona fide purchaser for value	6
6. Merchandise's negligence plus Bank of America's prejudice is a defense	7
7. Bank of America made an "actual application" of the credit for the 4 checks to the payment of the checks for \$75,000.00	8
8. Bank of America does not ignore this case or the findings	10

Table of Authorities Cited

Cases	Pages
Commercial National Bank v. Armstrong, 148 U.S. 50, 13 S.Ct. 532	3, 4
Gonsalves case, 16 Cal. 2d 169, 105 P. 2d 118.....	7
People ex rel. Nelson v. Sheridan Trust and Savings Bank, 353 Ill. 290, 193 N.E. 186.....	4
State Bank of Chicago v. Mid-City Trust and Savings Bank, 293 Ill. 599, 120 N.E. 499.....	2
Statutes	
California Bank Act, section 16c	5
California Civil Code, section 3108	6
Texts	
40 Am. Jur. 848	8
Restatement of Restitution, section 142	6

United States Court of Appeals For the Ninth Circuit

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CAGO, a national banking association,

Appellee.

APPELLANTS' REPLY TO APPELLEE'S SUPPLEMENTAL BRIEF.

1. BANK OF AMERICA DOES NOT BASE ITS CASE ON LOFENDO'S RIGHTS.

Merchandise says that Lofendo "was United Produce"; that "United Produce had no rights arising out of the 6 or the 4 checks, because of the fraud"; and that Bank of America "rests its case on 'Lofendo's' rights" (MSB, 6-7).¹

Merchandise makes this argument as though Bank of America was an assignee of Lofendo or United and was

¹"MSB" stands for Merchandise's supplemental brief, and "MRB" for its reply brief.

seeking to enforce the rights of either of them against Merchandise. But this is not the case at all. The fact is that when Merchandise charged United's account, marked the checks paid, credited Bank of America and sent Bank of America the advices of credit, the checks were paid and Bank of America received the proceeds of their payment, that is the credits, and Bank of America became indebted to Lofendo in the amount of the payments. Bank of America is not suing Merchandise to enforce any rights of Lofendo, but Merchandise is suing Bank of America to recover its payments of the checks. Bank of America does not base its rights to retain these payments on Lofendo in any way whatever.

2. MERCHANDISE'S ARGUMENT THAT IT DID NOT PAY THE CHECKS BUT ONLY BECAME OBLIGATED TO PAY THEM IS ENTIRELY UNJUSTIFIED.

Merchandise argues that when Bank of America says that the checks were paid, it means that Merchandise "became obligated to pay them" and in effect accepted them (MSB, 4).

"Payment is the final act which extinguishes a bill. Acceptance is a promise to pay in the future and continues the life of a bill"; *State Bank of Chicago v. Mid-City Trust and Savings Bank*, 293 Ill. 599, 120 N.E. 499, cited on page 5 of our reply brief.

When Merchandise charged the checks against United's account, marked them paid, credited Bank of America and sent Bank of America the advices of credit stating that the checks were paid and Bank of America had been credited, the checks were paid and extinguished and were not accepted and did not continue alive. Merchandise was not then obligated to pay them; it had paid them.

Any other conclusion would make havoc in the banking business.

3. THE CREDITS GRANTED BY MERCHANDISE WERE THE PROCEEDS OF THE CHECKS.

Merchandise says that Bank of America is in error when it refers to the "proceeds" of the 4 and 6 checks; that in this case "no funds were collected" and "there were no proceeds" (MSB, 5).

The collection letters directed that the "proceeds" of the checks be disposed of by crediting Bank of America. The credits were the proceeds. What other term could one use to describe what was obtained for the checks?

In making this contention, counsel for Merchandise seems to be laboring under the misconception that banks pay one another by transmitting bags of coin or currency. Of course, they don't. They pay by drafts and credits; by bookkeeping entries. And this is true whether or not they maintain deposit accounts with each other. Inter-bank deposit relations are characterized by this important difference from ordinary bank-customer deposit relations. The credits granted by Merchandise were not only the "proceeds" contemplated by the collection letter; they were the only proceeds to which the checks gave rise.

Merchandise tries to brush off *Commercial National Bank v. Armstrong*, 148 U.S. 50, 13 S.Ct. 532, cited on pages 26-27 of our closing brief, by stating that in it "the New York rule governed" (MSB, 2). The statement is totally irrelevant. In the *Commercial National Bank* case the court held that where the collecting-drawee banks to which the forwarding bank was indebted credited the forwarding bank on account of such indebtedness with the amount of the checks, the funds were thereupon transmitted to the forwarding bank. This would have been the

result whether the New York or Massachusetts rule was applicable. It was entirely unnecessary for the court to refer and the court did not refer to either of these rules.

When Merchandise (the collecting-drawee bank) credited Bank of America (the forwarding bank) on account of Bank of America's indebtedness to Merchandise with the amount of the checks, the funds, as held in the *Commercial National Bank* case, were thereupon transmitted to Bank of America; or to paraphrase the language of that case "the collection had been fully completed"; "it was the same as though the money had actually reached the vaults of" Bank of America.

And we should add that the *Commercial National Bank* case is followed by an authority which is important in this argument, a decision of the Supreme Court of Illinois where the Massachusetts rule prevails, that is *People ex rel. Nelson v. Sheridan Trust and Savings Bank*, 353 Ill. 290, 193 N.E. 186, cited on page 34 of our opening brief.

Merchandise says that United "had no funds to its account", and Lofendo "could not have compelled plaintiff to honor the checks" (MSB, 5).

United did have funds to its account, that is the proceeds of loans made by Merchandise to United which Merchandise had not disaffirmed and against which it had not exercised its right of set off (OB, 22-28).² But whether this be so or not Merchandise paid the checks and the credits it granted Bank of America represented the proceeds of the payment.

The fact that Lofendo could not have compelled Merchandise to honor the checks is, of course, entirely irrelevant. Merchandise did honor them.

²"OB" stands for Bank of America's opening brief, and "RB" for its reply brief.

United could not have compelled the branch to honor the checks for \$109,000.00. But when the branch charged these checks against uncollected funds it did honor them as Merchandise states repeatedly in its brief.

4. SECTION 16c OF THE CALIFORNIA BANK ACT AUTHORIZED BANK OF AMERICA TO ACCEPT CREDITS FROM MERCHANDISE IN PAYMENT OF THE CHECKS.

Merchandise now says that the question, whether section 16c of the California Bank Act authorized the forwarding bank or the collecting bank to designate the bank the credit of which may be accepted in payment, is "irrelevant" (MSB, 10). This is inconsistent with Merchandise's previous arguments (MRB, 58-59, 89-90, and footnote 45, p. 90).

But Merchandise nevertheless persists in saying that "a credit on plaintiff's books was not one" of the modes of payment authorized by section 16c (MSB, 10). The basis of this contention is that section 16c provides that a forwarding bank may accept in payment of a check a "solvent credit on the books of any Federal Reserve Bank or on the books of any bank designated as a depository by" the forwarding bank. Merchandise says that Merchandise had not been designated as a depository by Bank of America because Bank of America had not previously had a bank account with it on which Bank of America could draw to pay its obligations similar to the bank account maintained by Merchandise with Bank of America. But when Bank of America stated in the collection letters that Merchandise should deliver the checks only on payment and that Merchandise should dispose of the proceeds of the checks by crediting Bank of America, Bank of America was saying that it would accept a credit with Merchandise in payment of the checks. In

other words *Bank of America then and thereby designated Merchandise as a depositary* of those funds. What other meaning could the collection letters have? And when Merchandise entered the credits on its books in favor of Bank of America Merchandise in fact became a depositary, that is it owed Bank of America the credits. And the fact that Bank of America did not have an ordinary bank account with Merchandise does not militate in the slightest against this conclusion.

5. BANK OF AMERICA WAS IN THE POSITION OF A BONA FIDE PURCHASER FOR VALUE.

Merchandise in discussing Bank of America's claim that it was in the position of a bona fide purchaser of a right of set off asks "who owned a right of set off which defendant bought?;" and again it asks "and what is being set off against what?" (MSB, 5-6).

Bank of America made it clear that it held a lien on the proceeds of the checks and was therefore a holder for value under section 3108 of the California Civil Code. The fact that Lofendo became indebted to Bank of America a day or so after Merchandise paid the checks rather than a day or so before could not deprive it of this status (OB, 45-51; RB, 41-42).

Bank of America also made it clear that if it be assumed that it was not such a holder, still it was in the position of a bona fide purchaser of a right of set off (OB, 51-53; RB, 41-46).

At the close of business on November 16th, before Messenger's telephone call of November 17th putting Bank of America on notice that Merchandise was claiming that it had paid the six checks by mistake, Lofendo was entitled to the credit for the 4 and 6 checks and was

indebted to Bank of America because of its payment of the checks for \$109,000 and \$75,000. On that day Bank of America had a right (a right “in the nature of a lien”)³ to set off Lofendo’s indebtedness to it against the credits. It did not buy the right from anyone; it acquired the right under the law. And it was in the position of a bona fide purchaser of the right just as though it had taken a mortgage of property to secure an indebtedness to it before receiving notice that the mortgagor had obtained the property by fraud (OB, 51-53).

Moreover Merchandise is in no position to question Bank of America’s right to offset its payments of the \$184,000 (the checks for \$109,000 and \$75,000) against the credits because \$161,000 of these payments was received by Merchandise and applied by Merchandise on account of United’s indebtedness to it (OB, 54-56. BB, 46).

6. MERCHANDISE’S NEGLIGENCE PLUS BANK OF AMERICA’S PREJUDICE IS A DEFENSE.

Merchandise says that Bank of America asserts “that negligence plus prejudice to the other party is a bar” (MSB, 11).⁴ And then it says: “But the kind of prejudice required by the law is prejudice resulting from change of position by the recipient in reliance on the payment” (MSB, 11).

³In the *Gonsalves* case, 16 Cal. 2d 169, 105 P. 2d 118 (OB, 48-49), the court said that the right of a bank to charge what it owes its depositor with indebtedness owing by him to it is more correctly called “a right of set off” rather than a lien, but that it is “in the nature of a lien or security interest in the funds” (OB, 48-49).

⁴On page 70 of its reply brief it misstated Bank of America’s contention by saying that Bank of America argued that a payor cannot recover on the ground of mistake if the mistake was due to his negligence. Now it appears willing to correct its error.

This narrow view of the law is not sound. An action to recover a payment made by mistake is an equitable action. If a payor's mistake in making a payment was due to his negligence and the payee will suffer no prejudice as a result of such negligence if the payor recovers, then there is no equitable reason to bar the payor's recovery. But if the payee will suffer prejudice as a result of such negligence if payor is permitted to recover, then in equity and good conscience the payor should not recover.

This is the law as stated in 40 Am. Jur. 848 and sec. 142 of the Restatement of Restitution, cited and quoted from on pages 103-104 of our opening brief.

We quote an additional extract from this section of the Restatement:

"The rule stated in this Section is an application of the underlying principle of this subject that restitution is granted only where it is equitable so to do. Where events are such that a loss must be suffered by one of the parties, either with or without the ability to obtain reimbursement from a third person, justice does not require that the recipient should bear this loss, where he is guilty of no greater fault than that of the claimant." (p. 568.)

7. BANK OF AMERICA MADE AN "ACTUAL APPLICATION" OF THE CREDIT FOR THE 4 CHECKS TO THE PAYMENT OF THE CHECKS FOR \$75,000.00.

Merchandise says that Bank of America did not enter a charge for the four checks against Merchandise's account at its head office until November 19th after it had received notice in the Messenger Estribou telephone conversation of November 17th that Merchandise had paid the six checks in error; and that Bank of America "*never mentions this charge at all*" (Merch's italics; MSB, 8-9).

This statement is not correct. Bank of America does mention the entry of this charge on page 47 of its reply brief, pointing out that Merchandise's contention respecting it is another illustration of its fundamental fallacy that the checks were not collected and paid until Bank of America entered a charge against Merchandise on its books at its head office.

Merchandise also says that in any event the branch did not post the credit for the four checks until November 18th after the telephone conversation of the 17th (MSB, 8-9). The advices of credit for the four checks were received at the Branch on November 16th (I, 1182). It was stipulated that counter work, such as the credit for the four checks, was posted "on the next business day after the day *on which they were handled*, but the posting appeared under the day on which they were *actually handled*" (III, 960-961);⁵ and also that on November 17th the checks for \$75,000 were put in the counter work and the \$89,000 was "credited to the account" on November 17th and posted on the 18th and "concurrently the checks for \$75,586.86 were charged against the new funds" (IV, 1181, 1183).

Bank of America and Merchandise followed the same practice so far as delayed posting of counter work is concerned (III, 961). Merchandise's handling of the four and six checks illustrates the use of this method of delayed posting. When the six checks were received at Merchandise on November 15th, Merchandise on that day stamped the checks "Paid November 15, 1948" and mailed the advices of credit to Bank of America; and on the next day, November 16th, it pursuant to the practice of delayed posting entered on its books a charge against

⁵Merchandise in referring to this stipulation says that it appears on page 861 of the record (MSB, 9). The citation is incorrect. The correct citation is given in the text.

United's account as of November 15th and a credit in favor of Bank of America as of November 15th (IV, 1176; I, 289-294). It "handled" the checks on the 15th and made the postings on the 16th as of the 15th. In exactly the same way Bank of America on November 17th handled the credit for the four checks and the charge against this credit of the checks for \$75,586.86; and posted the entries on November 18th as of November 17th.

The facts must control the rights of the parties in this case, not as Merchandise repeatedly asserts the making of bookkeeping entries.

If Bank of America in order to bring its case within the rule of *Weiner v. Roof* must show what Merchandise calls "an actual application" of the credit for the four checks to the payment of the checks for \$75,586.86 (Bank of America, of course, does not concede this proposition), the stipulated facts of this case show such an application.

8. BANK OF AMERICA DOES NOT IGNORE THIS CASE OR THE FINDINGS.

Merchandise's statement, that Bank of America ignores the case and the findings (MSB, 1) is preposterous.

Bank of America has faced the decisive issues in this case fairly and squarely. And with two exceptions, these issues must be decided on the basis of stipulated facts or facts established without conflict. For example, the issue whether the checks were paid must be decided on the basis of such facts; and the trial court's finding that they were not paid is erroneous because contrary to such facts and the law. The same is true of the other issues with the two exceptions we have mentioned. These two exceptions are the findings (1) that Bank of America was negligent in not discovering the kite and (2) that

Bank of America agreed to repay Merchandise the latter's payment of the six checks.

Bank of America argued the question whether the latter finding is supported by the evidence on the basis of Merchandise's own evidence (OB, 107-117). And it pointed out that the former finding is not supported by the evidence (OB, 89-95); but that if it be assumed that it is so supported, it does not help Merchandise because Merchandise's gross negligence is the primary cause of the loss and because the law will leave the loss where the parties have placed it (OB, 103-106; RB, 55-57).

Dated, San Francisco, California,

March 24, 1952.

Respectfully submitted,

SAMUEL B. STEWART, JR.,

G. D. SCHILLING,

MORSE ERSKINE,

ERSKINE, ERSKINE & TULLEY,

Attorneys for Appellants.

No. 13042

United States
Court of Appeals
for the Ninth Circuit.

DOUGLAS HEAY,

Appellant,

vs.

DEAN PHILLIPS, CHARLES GRAY and
JAMES KELLY,

Appellees.

Transcript of Record

Appeal from the District Court
for the Territory of Alaska
Fourth Division

FILED

DEC 17 1951

PAUL P. O'BRIEN

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, CA **CLERK**

No. 13042

United States
Court of Appeals
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DOUGLAS HEAY,

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	PAGE
Additional Designation of Record.....	341
Affidavit of Bullock, Joanne R.....	24
Affidavit for Attachment.....	14
Amended Complaint	6
Answer	5
Answer to Plaintiff's Second Amended Complaint	12
Attachment Writ	17
Attorneys of Record.....	1
Certificate of Clerk.....	336
Clerk's Ruling on Objections to Cost Bill....	39
Complaint	3
Cost Bill	37
Designation of Record (U.S.C.A.).....	339
Designation of Record (U.S.D.C.).....	47
Findings of Fact and Conclusions of Law....	33
Judgment	35
Motion to Dismiss.....	21, 29

INDEX	PAGE
Motion to Strike.....	29
Motion for a New Trial.....	40
Motion to Set Hearing.....	42
Notice of Appeal.....	44
Notice of Appeal from Clerk’s Ruling on Ob- jections to Cost Bill.....	40
Notice of Hearing.....	22
Notice of Setting for Trial Filed April 2, 1951	23
Notice of Setting for Trial Filed April 7, 1951	23
Objections to Plaintiffs’ Cost Bill.....	38
Order Granting Motion to Dismiss Complaint	22
Order Setting Cause for Trial.....	25
Order and Trial by Court.....	29
Order Sustaining Clerk’s Ruling on Cost Bill and Denying a New Trial.....	43
Second Amended Complaint.....	9
Statement of Points (U.S.C.A.).....	338
Subpoenas, Plaintiffs’	26, 27
Summons	19
Supersedeas Bond.....	44
Transcript of Proceedings.....	48

INDEX

PAGE

Witnesses, Defendant's:

Freericks, Charles James

—direct	262
—cross	265
—redirect	266

Hubbard, Ernest

—direct	268
—cross	275
—redirect	292
—recross	293

Ragle, Richard Charles

—direct	294
—cross	308
—redirect	314

Witnesses, Plaintiffs':

Acord, Randall K.

—direct	211
—cross	231
—redirect	239
—recross	243

Bachner, Jess G.

—direct	162
—cross	188
—redirect	201, 209
—recross	208

	INDEX	PAGE
Witnesses, Plaintiffs'—Continued:		
Evans, Hawley N.		
—direct	320
—cross	328
—redirect	331
Freericks, Charles James		
—direct	249
Heay, Douglas		
—direct	58, 101, 317
—cross	254
—redirect	260
—recross	261
James, Floyd		
—direct	157
—cross	160
Phillips, Dean		
—direct	117, 132, 153
—cross	139
—recross	155
Trial by Court	28
Undertaking for Attachment	15

ATTORNEYS OF RECORD

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Attorney for Plaintiffs & Appellee,
Fairbanks, Alaska.

ROBERT A. PARRISH,

Attorney for Plaintiffs & Appellee,
Fairbanks, Alaska.

WILLIAM V. BOGGESS,

Attorney for Defendant & Appellant,
Fairbanks, Alaska.

In the District Court for the District of Alaska,
Fourth Division

No. 6690

DEAN PHILLIPS, CHARLES GRAY, and
JAMES KELLY,

Plaintiffs,

vs.

DOUGLAS HEAY,

Defendant.

COMPLAINT

Comes Now the above-named Plaintiffs and for
cause of action allege:

I.

That on September 20, 1950, the Plaintiffs were
the owners of a Piper Super Cruiser aircraft, the
same having a 115 horsepower engine.

II.

That on or about said day and at the request and
insistence of the Defendant, the Plaintiffs did lend
said aircraft to the Defendant.

III.

That at approximately 11:00 o'clock a.m. at or
near Paxon Lake, Alaska, on the 20th day of Sep-
tember, 1950, and while said aircraft was in the ex-
clusive possession and control of Defendant and
while Defendant was operating same, said aircraft
collided with the ground and was totally and com-
pletely destroyed. [1-A*]

*Page numbering appearing at foot of page of original Certified
Transcript of Record.

IV.

That subsequent to the destruction of said aircraft, the Defendant did promise and agree to immediately pay unto the Plaintiffs the sum of \$3,000.00 as the reasonable value of and for said aircraft.

V.

That to the date hereof, Defendant has paid unto the Plaintiffs only the sum of \$650.00.

VI.

That there is now due and owing from Defendant to Plaintiffs the unpaid balance of \$2,350.00, which amount the Plaintiffs have demanded of Defendant, but the Defendant has failed and refused to pay.

Wherefore, Plaintiffs pray judgment against the Defendant as follows:

1. For the sum of \$2,350.00 with interest thereon at the rate of six (6) per cent per annum from the 1st of October, 1950.

2. For Plaintiffs' costs and disbursements herein, together with a reasonable sum as and for Plaintiffs' attorney fees.

3. For such other and further relief as to the Court may seem just and equitable.

/s/ GEORGE B. McNABB, JR.,
Attorney for Plaintiffs.

[Endorsed]: Filed January 24, 1951. [2]

[Title of District Court and Cause.]

ANSWER

Comes now the above-named defendant and for answer to plaintiffs' complaint on file herein, admits, denies and alleges as follows:

1.

Defendant admits the allegations of Paragraph 1 of Plaintiffs' Complaint.

2.

Defendant admits that part of Paragraph 2 of Plaintiffs' amended complaint which states "the plaintiffs did lend said airplane to the defendant" and denies each and every other allegation contained therein.

3.

Defendant admits the allegations contained in Paragraph 3 of Plaintiffs' amended complaint.

4.

Defendant denies the allegations contained in paragraph 4 of plaintiffs' amended complaint.

5.

Defendant admits the allegations contained in paragraph 5 of plaintiffs' amended complaint.

6.

Defendant denies the allegations contained in paragraph 5 of plaintiffs' amended complaint.

Wherefore, having answered plaintiffs' amended

complaint, defendant [3] prays that plaintiffs' complaint be dismissed and the defendant do have a recover from the plaintiffs a reasonable attorney fee to be allowed by the court.

/s/ WARREN A. TAYLOR,
Attorney for Defendant.

Receipt of Copy acknowledged.

[Endorsed]: Filed March 31, 1951. [4]

[Title of District Court and Cause.]

AMENDED COMPLAINT

Comes Now the above-named plaintiffs and for cause of action allege:

I.

That on September 20, 1950, the Plaintiffs were the owners of a Piper Super Cruiser aircraft, the same having a 115 horsepower engine.

II.

That on or about said day and at the the request and insistence of the Defendant, the Plaintiffs did lend said aircraft to the Defendant for and in consideration of Defendant's promise to repair said aircraft if damaged or to pay the reasonable value of same if destroyed while in Defendant's possession.

III.

That at approximately 11:30 o'clock a.m. at or near Paxson Lake, Alaska, on the 20th day of Sep-

tember, 1950, and while said aircraft was in the exclusive possession and control [5] of Defendant and while Defendant was operating same, said aircraft collided with the ground and was totally and completely destroyed.

IV.

That subsequent to the destruction of said aircraft, the Defendant did in compliance with his aforementioned promise agree to immediately pay unto the Plaintiffs the sum of \$3,000.00 as the reasonable value of and for said aircraft.

V.

That to the date hereof, Defendant has paid unto the Plaintiffs only the sum of \$650.00.

VI.

That there is now due and owing from Defendant to Plaintiffs the unpaid balance of \$2,350.00, which amount the Plaintiffs have demanded of Defendant, but the Defendant has failed and refused to pay.

Wherefore, Plaintiffs pray judgment against the Defendant as follows:

1. For the sum of \$2,350.00 with interest thereon at the rate of six (6) per cent per annum from the 1st of October, 1950.

2. For Plaintiffs' costs and disbursements herein, together with a reasonable sum as and for Plaintiffs' attorney fees.

3. For such other and further relief as to the [6] court may seem just and equitable.

/s/ GEORGE B. McNABB, JR.,
Attorney for Plaintiffs.

James Kelly, first being duly sworn, on his oath deposes and says: That he is one of the Plaintiffs in the above-entitled cause; that he has read the above and foregoing complaint, knows the contents thereof and the same is true.

/s/ JAMES W. KELLY.

Subscribed and Sworn to before me this 19th day of March, 1951.

[Seal] /s/ GEORGE B. McNABB,
Notary Public in and for
Alaska.

My Commission expires: 4/10/54.

Receipt of Copy acknowledged.

[Endorsed]: Filed March 19, 1951. [7]

[Title of District Court and Cause.]

SECOND AMENDED COMPLAINT

Come Now the above-named Plaintiffs and for cause of action allege:

I.

That on September 20, 1950, the Plaintiffs were the owners of a Piper Super Cruiser aircraft, the same having a 115 horsepower engine.

II.

That on or about the said day and at the request and insistence of the Defendant, the Plaintiffs did lend said aircraft to the Defendant for and in consideration of Defendant's promise to repair said aircraft if damaged or to pay the reasonable value of same if destroyed while in Defendant's possession.

III.

That at approximately the hour of 11:00 o'clock a.m. at or near Paxson Lake, Alaska, on the 20th day of September, 1950, and while said aircraft was in the exclusive possession and control of Defendant and while Defendant was operating same, said aircraft collided with the ground and was totally and completely destroyed. [8]

IV.

That subsequent to the destruction of said aircraft, the Defendant did in compliance with his aforementioned promise agree to immediately pay unto the Plaintiffs the sum of \$3,000.00 as the reasonable value of and for said aircraft.

V.

That to the date hereof, Defendant has paid unto the Plaintiffs only the sum of \$650.00.

VI.

That there is now due and owing from Defendant to Plaintiffs the unpaid balance of \$2,350.00, which amount the Plaintiffs have demanded of Defendant, but the Defendant has failed and refused to pay the same.

Come Now the Plaintiffs above named, and for a second, further and alternative cause of action allege as follows:

I.

That on September 20, 1950, the Plaintiffs were the owners of a Piper Super Cruiser aircraft, the same having a 115 horsepower engine.

II.

That on or about said the Plaintiffs did, at the request of the Defendant, lend to the Defendant said aircraft for the purpose of making a trip to Paxson and Tangle Lakes, Alaska, to transport a mechanic to repair the aircraft previously wrecked by the Defendant in the vicinity of said lakes.

III.

That at approximately 11:00 a.m. at or near Paxson Lake, Alaska, on or about the 20th day of September, 1950, and while said aircraft was in [9] the exclusive possession and control of the Defendant and while Defendant was operating the same,

said aircraft collided with the ground and was totally and completely destroyed, through the negligence of the Defendant in operating said aircraft.

IV.

That subsequent to the destruction of said aircraft, the Defendant did in compliance with his aforementioned promise, agree to immediately pay unto the Plaintiffs the sum of \$3,000.00 as the reasonable value of and for said aircraft.

V.

That to the date hereof, Defendant has paid unto the Plaintiffs only the sum of \$650.00.

VI.

That there is now due and owing from Defendant to Plaintiffs the unpaid balance of \$2,350.00, which amount the Plaintiffs have demanded of Defendant, but the Defendant has failed and refused to pay the same.

Wherefore, Plaintiffs pray judgment against the Defendant on their First Cause of Action or on their Second Cause of Action as follows:

1. For the sum of \$2,350.00 with interest thereon at the rate of six (6) per cent per annum from the 1st of October, 1950.

2. For Plaintiffs' costs and disbursements herein, together with a reasonable sum as and for Plaintiffs' attorney fees.

3. For such other and further relief as to the Court may seem just and equitable.

/s/ GEORGE B. McNABB, JR.,
Attorney for Plaintiffs. [10]

James Kelly, first being duly sworn, on his oath deposes and says: That he is one of the Plaintiffs in the above-entitled cause; that he has read the above and foregoing complaint, knows the contents thereof and the same is true as he verily believes.

/s/ JAMES KELLY.

Subscribed and Sworn to before me this 7th day of May, 1951.

[Seal] /s/ JOANNE R. BULLOCK,
Notary Public in and for the
Territory of Alaska.

My Commission Expires March 21, 1955.

Receipt of Copy acknowledged.

[Endorsed]: Filed May 7, 1951. [11]

[Title of District Court and Cause.]

**ANSWER TO PLAINTIFFS' SECOND
AMENDED COMPLAINT**

Comes now the Defendant and for answer to Plaintiffs' Second Amended Complaint alleges and avers as follows:

I.

Admits the allegations contained in paragraphs I, III and V.

II.

Denies the allegations contained in paragraphs II, IV and VI.

For answer to Plaintiffs' second, further and alternative cause of action contained in Plaintiffs' Second Amended Complaint, Defendant alleges and avers as follows:

I.

Admits the allegations contained in paragraphs I and V.

II.

Denies the allegations contained in II, III, IV and VI.

Wherefore, having answered plaintiffs' Second Amended Complaint, defendant prays that the same be dismissed and the defendant do have and recover from the plaintiffs a reasonable attorney's fee to be allowed by the Court.

/s/ WILLIAM V. BOGGESS,
Attorney for Defendant.

Receipt of Copy acknowledged.

[Endorsed]: Filed May 8, 1951. [12]

[Title of District Court and Cause.]

AFFIDAVIT FOR ATTACHMENT

United States of America,

Territory of Alaska, Fourth Division—ss.

I, Dean Phillips, being duly sworn, say: That I am one of the plaintiffs in the above-entitled action, and make this affidavit for the purpose of securing the issuance of a writ of attachment out of the above-entitled court against the property of the said defendant; that the defendant above named is indebted to the above-named plaintiffs in the sum of Two Thousand Four Hundred Sixty-four & no/100 Dollars (\$2,464.00) over and above all legal set-offs and counter-claims upon an oral contract for the direct payment of money, to wit: reasonable value of and for Plaintiffs' aircraft.

That the payment of the same has not been secured by any mortgage, lien, or pledge upon real or personal property; that said sum, for which the attachment is asked in the above-entitled action, is an actual, bona fide, existing debt, due and owing from the said defendant to the said plaintiff, and that the said attachment is not sought nor is said action prosecuted to hinder, delay, or defraud any creditor of the said defendant.

/s/ DEAN W. PHILLIPS.

Subscribed and sworn to before me this 24th day of January, A.D. 1951.

[Seal] /s/ GEORGE B. McNABB, JR.,
Notary Public in and for the Territory of Alaska.

My commission expires 4/10/54.

[Endorsed]: Filed January 24, 1951. [13]

[Title of District Court and Cause.]

UNDERTAKING FOR ATTACHMENT

Whereas, the above-named plaintiffs have commenced an action in the above-entitled court to recover from the above-named defendant the sum of Two Thousand Four Hundred Sixty-four Dollars (\$2,464.00) on a contract for the direct payment of money, and are desirous that a writ of attachment issue out of said court against property of the said defendant:

Now, Therefore, we, Dean Phillips as principal, and Charles Gray and James Kelly as sureties, in consideration of the issuance of said writ of attachment, do hereby jointly and severally promise and undertake in the sum of Two Thousand Four Hundred Sixty-four Dollars (\$2,464.00) that the plaintiffs above named will pay all costs that may be adjudged to the above-named defendant and all damages that he may sustain by reason of such attachment if the same be wrongful or without sufficient cause, not exceeding the sum of \$2,464.00.

In Witness Whereof we have hereunto set our

hands and seals this 24th day of January, A.D. 1951.

[Seal] /s/ DEAN PHILLIPS,
Principal.

[Seal] /s/ CHARLES GRAY,
!s/ JAMES KELLY.
Sureties.

United States of America,
Territory of Alaska, Fourth Division—ss.

I, Charles Gray, and I, James Kelly, each being duly sworn, say: That I am a surety on the foregoing undertaking; that I am a resident within the Territory of Alaska; that I am not a counselor or attorney at law, marshal, deputy marshal, commissioner, clerk of any court, or other officer of any court and that I am worth the sum of Four Thousand Nine Hundred Twenty-eight Dollars (\$4,928.00) over and above all debts and liabilities and property exempt from execution.

/s/ CHARLES GRAY.

/s/ JAMES KELLY.

Subscribed and sworn to before me this 24th day of January, A.D. 1951.

[Seal] /s/ GEORGE B. McNABB, JR.,
Notary Public in and for the
Territory of Alaska.

My commission expires 4/10/54.

[Endorsed]: Filed January 24, 1951. [14]

[Title of District Court and Cause.]

ATTACHMENT WRIT

The President of the United States of America,

To the Marshal of the District of Alaska,

Division No. 4, Greeting:

Whereas, Dean Phillips, Charles Gray and James Kelly hath complained that Douglas Heay is justly indebted to them to the amount of Two Thousand Four Hundred Sixty-four Dollars and no/100 cents and the necessary affidavit and undertaking herein having been filed as required by law;

We Therefore Command You, That you attach and safely keep all the property of the said defendant not exempt from execution, or so much thereof as may be sufficient to satisfy the plaintiffs' demand, as above stated, to be found in your Division of said District, and as shall be of value sufficient to satisfy the said debt and the costs and disbursements of the said plaintiff herein. And of this writ make due service and return.

Witness, the Hon. Harry E. Pratt, Judge of said Court, and the seal thereof affixed at Fairbanks, in said District, this 24th day of January, 1951.

[Seal]

JOHN B. HALL,
Clerk.

By /s/ OLGA T. STEGER,
Deputy. [15]

[Title of District Court and Cause.]

NOTICE OF GARNISHMENT

To Firemen's Metropolitan Insurance Co.,
220 Bush Street, San Francisco, California.

You will please take notice that all moneys, gold dust, goods, credits, effects, debts due or owing, and all other personal property in your possession or under your control, belonging to or owing to the defendant named in the writ of attachment, of which the annexed is a true copy, is hereby attached by virtue of said writ. And you are hereby notified not to pay over to or transfer or deliver the same or any part thereof to the said defendant or anyone but the undersigned United States Marshal for the Fourth Division, Territory of Alaska.

Please furnish statement as provided under Section 55-6-69, ACLA, 1949.

Dated at Fairbanks, Alaska, this 24th day of January, 1951.

THEODORE R. McROBERTS,
U. S. Marshal.

By /s/ ARTHUR S. BREMER,
Deputy [15-A]

Territory of Alaska
Office of the Auditor
Juneau

CERTIFICATE

I, Neil F. Moore, Auditor of the Territory of Alaska and ex-officio Insurance Commissioner of said Territory, Do Hereby Certify that I have been served with Writ and Notice of Garnishment, Dean Phillips, Charles Gray and James Kelly, Plaintiffs, vs. Douglas Heay, Defendant, and I hereby accept service of such process. Attached hereto a copy of said Writ and Notice of Garnishment.

In Testimony Whereof, I have hereunto set my hand and affixed my official seal, at Juneau, the Capital, this 30th day of January, A.D. 1951.

[Seal] /s/ NEIL F. MOORE,
Auditor of Alaska, and
Registrar of Vital Statistics.

Receipt of Copy acknowledged.

[Endorsed]: Filed February 5, 1951. [15-B]

[Title of District Court and Cause.]

SUMMONS

The President of the United States of America,
Greeting:

To the Above-Named Defendant—

You are Hereby Required to appear in the District Court for the Territory of Alaska, Fourth

Division, within twenty days after the day of service of this summons upon you, and answer the complaint of the above-named plaintiffs, a copy of which is herewith delivered to you; and unless you so appear and answer, the plaintiffs will take judgment against you as demanded in said complaint, to wit: for the sum of Two Thousand Four Hundred Sixty-four and no/100 Dollars.

Witness, the honorable Harry E. Pratt, Judge of said Court, this 24th day of January in the year of our Lord one thousand nine hundred and fifty-one.

[Seal] /s/ JOHN B. HALL,
Clerk.

By /s/ OLGA T. STEGER,
Deputy Clerk. [16]

Marshal's Return

United States of America,
Territory of Alaska, Fourth Division—ss.

I Hereby Certify, That I received the foregoing Summons on the 24th day of January, 1951, and that I duly served the same on the therein named defendant Douglas Heay at Fairbanks, Alaska, on the 6th day of February, 1951, and by then and there delivering personally to Mrs. Douglas Heay, wife of defendant, at their usual place of abode, a copy of said Summons and a copy of said Com-

plaint, certified to be such copy by the plaintiff's attorney of record.

THEODORE R. McROBERTS,
United States Marshal,
Fourth Division.

By /s/ THEODORE R. LOWELL,
Deputy.

Receipt of copy acknowledged.

[Endorsed]: Filed February 14, 1951. [16-A]

[Title of District Court and Cause.]

MOTION TO DISMISS

Comes now the above-named defendant and moves this Honorable Court to dismiss the complaint on file in the above-entitled cause for the reason that said complaint fails to state a claim upon which relief can be granted to the plaintiff.

/s/ WARREN A. TAYLOR,
Attorney for Defendant.

Receipt of Copy acknowledged.

[Endorsed]: Filed February 26, 1951. [17]

[Title of District Court and Cause.]

NOTICE OF HEARING

To Warren A. Taylor and William V. Boggess,
Counsel for the **Above-Named Defendant.**

You Are Hereby Notified that on the 9th day of March, 1951, at 3:00 p.m., or as soon thereafter as the same can be heard, the issue in the above-entitled cause raised by the defendant's Motion to Dismiss, will be brought on for hearing .

/s/ GEORGE B. McNABB, JR.,
Attorney for Plaintiff.

Receipt of Copy acknowledged.

[Endorsed]: Filed March 3, 1951. [18]

[Title of District Court and Cause.]

ORDER

The plaintiffs were represented by Geo. B. McNabb; the defendant by William V. Boggess.

Mr. Boggess had argument on the defendant's Motion to Dismiss; Mr. McNabb submitted the matter.

It was Ordered that the Motion be granted and the plaintiffs were granted ten (10) days in which to amend the complaint.

Entered March 9, 1951. [19]

[Title of District Court and Cause.]

NOTICE OF SETTING FOR TRIAL

To Warren A. Taylor and William V. Boggess,
Counsel for Defendant.

You are hereby notified that on the 6th day of April, 1951, at the hour of 3:00 o'clock p.m., or as soon thereafter as the same can be heard, the above-entitled cause will be brought on for setting for trial.

Dated this 31st day of March, 1951.

/s/ GEORGE B. McNABB, JR.,
Attorney for Plaintiffs.

Receipt of Copy acknowledged.

[Endorsed]: Filed April 2, 1951. [20]

[Title of District Court and Cause.]

NOTICE OF SETTING FOR TRIAL

To Warren A. Taylor and William V. Boggess,
Counsel for Defendant.

You are hereby notified that on the 13th day of April, 1951, at the hour of 3:00 o'clock p.m., or as soon thereafter as the same can be heard, the above-

entitled cause will be brought on for setting for trial.

Dated this 7th day of April, 1951.

/s/ GEORGE B. McNABB, JR.,
Counsel for Plaintiffs.

[Endorsed]: Filed April 7, 1951. [21]

[Title of District Court and Cause.]

AFFIDAVIT

Joanne R. Bullock, being first duly sworn, on her oath deposes and says:

I did on the 7th day of April, 1951, serve upon Warren A. Taylor a copy of a Notice of Setting for Trial of the above-entitled cause by leaving a copy thereof at the office of the said Warren A. Taylor.

Further Affiant sayeth not.

/s/ JOANNE R. BULLOCK.

Subscribed and Sworn to before me this 10th day of April, 1951.

[Seal] /s/ GEORGE B. McNABB, JR.,
Notary Public in and for the
Territory of Alaska.

My commission expires 4/10/54.

[Endorsed]: Filed April 11, 1951. [22]

[Title of District Court and Cause.]

ORDER

On the Motion of Geo. B. McNabb, Jr., counsel for the plaintiff, Warren A. Taylor, counsel for the defendant being present and consenting thereto, it was Ordered that the trial of this cause be set for 10:00 a.m., Monday, May 7, 1951.

Entered April 13, 1951. [23]

[Title of District Court and Cause.]

CIVIL SUBPENA

To Jess Bachner, 1010 Ninth, Fairbanks, Alaska:

You are Hereby Commanded to appear in the District Court of the United States for the Fourth Division, at the courthouse in the city of Fairbanks, in said District, on the seventh day of May, A.D. 1951, at 10:00 o'clock a.m. of said day, then and there to testify on behalf of the Plaintiffs in a suit pending in said Court wherein Dean Phillips, Charles Gray and James Kelly are Plaintiffs and Douglas Heay is Defendant.

[Seal] /s/ JOHN B. HALL,
Clerk.

By /s/ OLGA T. STEGER,
Deputy Clerk.

Return on Service attached.

[Endorsed]: Filed May 14, 1951. [24]

[Title of District Court and Cause.]

CIVIL SUBPENA

To Douglas Heay:

You are Hereby Commanded to appear in the District Court of the United States for the Fourth Division, at the courthouse in the city of Fairbanks, Alaska in said District, on the 8th day of May, A.D. 1951, at 10 o'clock a.m. of said day, then and there to testify on behalf of the Plaintiffs in a suit pending in said Court wherein Dean Phillips, Charles Gray and James Kelly are Plaintiffs and Douglas Heay is Defendant.

[Seal] /s/ JOHN B. HALL,
Clerk.

By /s/ OLGA T. STEGER,
Deputy Clerk.

Return on Service attached.

[Endorsed]: Filed May 14, 1951. [25]

[Title of District Court and Cause.]

CIVIL SUBPENA

To James Freericks, Weeks Tower, Weeks Field,
Fairbanks, Alaska:

You are Hereby Commanded to appear in the District Court of the United States for the Fourth Division, at the courthouse in the city of Fairbanks,

in said District, on the seventh day of May, A.D. 1951, at 10:00 o'clock a.m. of said day, then and there to testify on behalf of the Plaintiffs in a suit pending in said Court wherein Dean Phillips, Charles Gray and James Kelly are Plaintiffs and Douglas Heay is Defendant.

[Seal] /s/ JOHN B. HALL,
Clerk.

By /s/ OLGA T. STEGER,
Deputy Clerk.

Service of copy attached.

[Endorsed]: Filed May 14, 1951. [26]

[Title of District Court and Cause.]

CIVIL SUBPENA DUCES TECUM

To Floyd James, 312 Fourth, Fairbanks, Alaska :

You are Hereby Commanded to appear in the District Court of the United States for the Fourth Division, at the Courthouse, in the city of Fairbanks, in said District, on the seventh day of May A.D. 1951, at 10:00 o'clock a.m. of said day, and also that you bring with you and produce at the time and place aforesaid all cancelled checks which you have in your possession to the order of Douglas Heay for the purchase of parts for aircraft, then and there to testify on behalf of the Plaintiffs in a suit pending in said Court wherein Dean Phillips,

Charles Gray and James Kelly are Plaintiffs and Douglas Heay is Defendant.

Witness, the Honorable Harry E. Pratt, District Judge of the United States, this 5th day of May, A.D. 1951.

[Seal] /s/ JOHN B. HALL,
Clerk.

By /s/ OLGA T. STEGER,
Deputy Clerk.

Return on Service attached.

[Endorsed]: Filed May 14, 1951. [27]

[Title of District Court and Cause.]

TRIAL BY COURT

The plaintiffs were present and represented by Geo. B. McNabb; the defendant was represented by William V. Boggess.

On the Motion of Mr. McNabb, it was Ordered that the plaintiffs be permitted to file their Second Amended Complaint and, in order for the defendant to prepare his defense to the aforesaid pleading, it was Ordered that the trial of this cause be continued to 10:00 a.m., Tuesday, May 8, 1951.

* * *

Entered May 7, 1951. [28]

[Title of District Court and Cause.]

MOTION TO DISMISS

Comes now the Defendant and moves this Honorable Court to Dismiss the second, further and alternative cause of action contained in Plaintiffs' Second Amended Complaint on file herein upon the grounds that the same does not state a claim upon which relief can be granted to the Plaintiffs; or, in the alternative to

Motion to Strike

strike Plaintiffs' said second cause of action upon the grounds that the same is immaterial, redundant and superfluous.

/s/ WILLIAM V. BOGGESS,
TAYLOR & BOGGESS,
Attorneys for Defendant.

Receipt of copy acknowledged.

[Endorsed]: Filed May 8, 1951. [29]

[Title of District Court and Cause.]

ORDER AND TRIAL BY COURT (Continued)

The plaintiffs were present and represented by Geo. B. McNabb; the defendant was present and represented by William V. Boggess.

Respective counsel had argument on the defendant's Motion to dismiss and motion to strike.

It was Ordered that the Motions be denied.

Mr. Boggess filed the defendant's Answer to the Second Amended Complaint.

Mr. Boggess moved the Court for a continuance of the trial of this cause and presented argument to the Court.

Mr. McNabb presented argument resisting the Motion for a Continuance.

It was Ordered that the Motion for a continuance be denied.

* * *

Plaintiffs Dean Phillips and James Kelly were present and represented by Geo. B. McNabb; the defendant was present and represented by William V. Boggess.

On the Motions of Geo. B. McNabb, it was Ordered that the name of Robert A. Parrish be entered as co-counsel for the plaintiff and that all witnesses, excepting the parties, be excluded from the Court Room except when testifying.

Douglas Heay was duly sworn and testified for the plaintiff.

* * *

Entered May 8, 1951. [30]

Came the parties with their counsels as heretofore and the trial of this cause was resumed.

Douglas Heay, previously sworn, testified further for the plaintiffs.

Dean Phillips was duly sworn and testified in his own behalf.

Floyd James was duly sworn and testified for the plaintiff.

The trial of this cause was continued until 10:00 a.m., Wednesday, May 9, 1951.

* * *

Entered May 8, 1951. [31]

Came the parties as heretofore with their counsels and the trial of this cause was resumed.

Jesse T. Bachner was duly sworn and testified for the plaintiffs.

* * *

Court was recessed to 2:00 p.m.

* * *

2:00 p.m.

Randall K. Acord and Charles James Freericks were duly sworn and testified for the plaintiffs.

The plaintiffs rested.

Douglas Heay, the defendant, having been previously called as a witness by the plaintiffs, was cross-examined by his counsel.

James Freericks, previously sworn, testified for the defendant.

The trial of this Cause was continued until 10:00 a.m., Thursday, May 10, 1951.

* * *

Entered May 9, 1951. [32]

Came the respective counsels as heretofore; came the defendant in person and the trial of this cause was resumed.

Ernest Hubbard and Richard Charles Ragle were duly sworn and testified for the defendant.

The trial of this cause was continued until 2:00 p.m.

* * *

Entered May 10, 1951. [33]

Came the respective counsels and the defendants as heretofore and the trial of this cause was resumed.

Richard Charles Ragle, previously sworn, testified further for the defendant.

Douglas Heay, previously sworn, testified further in his own behalf.

The defendant rested.

Hawley Evans was duly sworn and testified in behalf of the plaintiffs in rebuttal.

Both parties rested.

Mr. McNabb presented the opening argument for the plaintiff; Mr. Boggess presented his argument for the defendant; Mr. McNabb presented his closing argument.

The Court found for the plaintiffs and directed that Findings of Fact and Conclusions of Law and Judgment be drawn accordingly.

* * *

Entered May 10, 1951. [34]

[Title of District Court and Cause.]**FINDINGS OF FACT AND CONCLUSIONS
OF LAW**

This Cause having come on regularly for hearing on the 8th day of May, 1951, and the above-named Plaintiffs being represented by their Counsel, George B. McNabb, Jr., and Robert A. Parrish, and the Defendant being before the Court and being represented by his Counsel, William Boggess, and the Court having heard evidence by both of the parties hereto on the allegations of the Complaint and the Plaintiffs having elected to stand upon the allegations of the Second Cause of Action, and the Court being fully advised in the premises, does hereby enter the following Findings of Fact and Conclusions of Law.

I.

That on September 20, 1950, the Plaintiffs were the owners of a Piper Super Cruiser aircraft, the same having a 115 horsepower engine.

II.

That on or about said day, the Plaintiffs did, at the request of the Defendant, lend to the Defendant said aircraft for the purpose of making a trip to Paxson and Tangle Lakes, Alaska, to transport a mechanic to repair the aircraft previously wrecked by the Defendant in the vicinity of said lakes.

III.

That at approximately 11:00 a.m. at or near Paxson Lake, Alaska, on or about the 20th day of

September, 1950, and while said aircraft was [35] in the exclusive possession and control of the Defendant and while Defendant was operating the same, said aircraft collided with the ground and was totally and completely destroyed, through the negligence of the Defendant in operating said aircraft.

IV.

That the reasonable value of said aircraft is Three Thousand Dollars (\$3,000.00), and that Plaintiffs are entitled to recover as damages the sum of Three Thousand Dollars (\$3,000.00) less the sum of Six Hundred Fifty Dollars (\$650.00), already heretofore paid by said Defendant, the sum of Twenty-Three Hundred Fifty Dollars (\$2,350.00).

From the foregoing Findings of Fact, the Court does hereby make the following Conclusions of Law.

Conclusions of Law

I.

That the said Defendant was negligent in the operation of the aircraft of Plaintiffs at the time heretofore specified.

II.

That Plaintiffs are entitled to recover the sum of Three Thousand Dollars (\$3,000.00) less the sum of Six Hundred Fifty Dollars (\$650.00) heretofore paid, to wit, the sum of Twenty-Three Hundred Fifty Dollars (\$2,350.00) damages.

III.

That Plaintiffs are entitled to recover their reasonable attorneys' fees in the amount of \$435.00, and their costs and disbursements herein to be taxed by the Clerk of this Court, in the amount of \$214.45.

/s/ HARRY E. PRATT,
District Judge.

Receipt of copy acknowledged.

[Endorsed]: Filed May 12, 1951. [36]

In the District Court for the District of Alaska,
Fourth Division

No. 6690

DEAN PHILLIPS, CHARLES GRAY and
JAMES KELLY,

Plaintiffs,

vs.

DOUGLAS HEAY,

Defendant.

JUDGMENT

This Cause having come on regularly for hearing on the 8th day of May, 1951, and the Plaintiffs being represented by their Attorneys, George B. McNabb, Jr., and Robert A. Parrish, and the Defendant being represented by his Attorney, William Boggess, and the Court having heard testimony and evidence by all of the parties hereto, and having

heretofore entered Findings of Fact and Conclusions of Law herein, and the Court being duly advised in the premises:

It Is Hereby Ordered, Adjudged and Decreed that Plaintiffs do have and recover of the Defendant the sum of Twenty-Three Hundred Fifty Dollars (\$2,350.00) together with their reasonable attorneys' fees in the amount of \$435.00, and the costs and disbursements to be assessed by the Clerk of this Court in the amount of \$214.45. That execution issue hereon in ten (10) days.

Now, It Is Hereby Ordered that the Plaintiffs have judgment against the Defendants for interest on said sum at the rate of Six (6%) per cent per annum from date of entry of Judgment.

Dated this 12th day of May, 1951.

/s/ HARRY E. PRATT,
District Judge.

Entered May 11, 1951.

[Endorsed]: Filed May 12, 1951. [37]

[Title of District Court and Cause.]

COST BILL

No. 6690

Marshal's Fees.....	\$ 9.00
Clerk's Fees.....	21.00
Witness Fees: Douglas Heay.....	4.00
Dean Phillips.....	4.00
Jess Bachner.....	4.00
Floyd James.....	8.00
Transportation for Dean Phillips—round trip from Nek Nek.....	164.45
<hr/>	
Total	\$214.45

United States of America,
Territory of Alaska—ss.

George B. McNabb, Jr., being duly sworn, deposes and says: That he is the Attorney for the Plaintiffs in the above-entitled cause, and as such is better informed, relative to the above costs and disbursements than the said Plaintiffs. That the items in the above memorandum contained are correct, to the best of this deponent's knowledge and belief, and that the said disbursements have been necessarily incurred in the said cause.

/s/ GEORGE B. McNABB, JR.,
Attorney for Plaintiffs.

Subscribed and sworn to before me, this 12th day of May, A.D. 1951.

[Seal] /s/ JOHN B. HALL,
Clerk.

Receipt of copy acknowledged.

[Endorsed]: Filed May 12, 1951. [38]

[Title of District Court and Cause.]

OBJECTIONS TO PLAINTIFFS' COST BILL

Comes now the above-named defendant and objects to the following items contained in plaintiffs' Cost Bill on file herein:

“Transportation for Dean Phillips—round trip from Nek Nek—\$164.45.”

for the following reasons:

1. That said item fails to show that said sum of \$164.45 was actually and necessarily paid out for the transportation of said Dean Phillips to attend the trial of this cause, and fails to show that the said sum was actually and necessarily paid out for the transportation of the said Dean Phillips from his usual place of abode and that no receipt showing the payment of said sum is attached to said Cost Bill.

2. That Nek Nek, Alaska, is over 100 miles from the place of trial and that the said Dean Phillips voluntarily attended said trial without being sub-

poenaed as required by Sec. 58-3-7 ACLA 1949 as appears from the records and files herein, and that said item of \$164.45, therefore, was not necessarily incurred.

Dated at Fairbanks, Alaska, this 17th day of May, 1951.

/s/ WILLIAM V. BOGGESE, of
TAYLOR & BOGGESE,
Attorneys for Defendant.

Receipt of copy acknowledged.

[Endorsed]: Filed May 17, 1951. [39]

[Title of District Court and Cause.]

**CLERK'S RULING ON OBJECTIONS
TO COST BILL**

Pursuant to Section 55-11-59, Compiled Laws of Alaska Annotated, 1949, the Objection to the Cost Bill in this cause is overruled.

Witness my hand and the seal of this Court this 17th day of May, 1951.

[Seal] /s/ JOHN B. HALL,
Clerk of Court. [40]

[Title of District Court and Cause.]

NOTICE OF APPEAL FROM CLERK'S
RULING ON OBJECTIONS TO COST BILL

Notice is hereby given that the defendant appeals from the Clerk's ruling on the 17th day of May, 1951, overruling defendant's objections to plaintiff's Cost Bill on file herein upon the grounds that the Clerk's ruling was in error as to each of the grounds specified in defendant's objections.

Dated at Fairbanks, Alaska, this 21st day of May, 1951.

/s/ WILLIAM V. BOGGESS,
Attorney for Defendant.

Receipt of copy acknowledged.

[Endorsed]: Filed May 21, 1951. [41]

[Title of District Court and Cause.]

MOTION FOR A NEW TRIAL

Comes now the defendant and moves this Honorable Court for a new trial upon the following grounds and for the following reasons:

1. That the Court erred in denying defendant's Motion to Dismiss and, in the alternative, to Strike the second, further and alternative cause of action contained in plaintiff's Second Amended Complaint.

2. That the Court abused its discretion in overruling defendant's motion to continue the trial of said cause for a period of three days made in open Court on the 8th day of May, 1951, one day after the plaintiff's had filed a Second Amended Complaint, and in permitting and ordering the above-entitled cause to go to trial on that date without giving defendant adequate time to prepare his case to meet the Second, Further and Alternative cause of action contained in said Second Amended Complaint.

3. That the Court erred in permitting plaintiffs to change their election to pursue a contractual theory of recovery to a theory of recovery in tort after defendant's final argument.

4. That the evidence was insufficient to justify the findings of fact of the Court in the following particulars:

- (1) As to negligence; and
- (2) As to damages. [42]

5. That the evidence was insufficient to justify the decision of the Court.

Dated at Fairbanks, Alaska, this 22nd day of May, 1951.

/s/ WILLIAM V. BOGGESS,
Attorney for Defendant.

Receipt of copy acknowledged.

[Endorsed]: Filed May 22, 1951. [43]

[Title of District Court and Cause.]

MOTION TO SET HEARING

Comes Now the above-named Plaintiffs by their attorneys, George B. McNabb, Jr., and Robert A. Parrish, and respectively move this Honorable Court as follows:

1. For an Order bringing on for hearing the Defendant's Motion for New Trial heretofore filed in the above-entitled cause, at a date not later than the hour of 3:00 p.m., or as soon thereafter as the same may be heard, on Friday, May 25, 1951.

/s/ GEORGE B. McNABB, JR.,

/s/ ROBERT A. PARRISH,
Attorneys for Plaintiffs.

ORDER FOR HEARING

This cause having come on regularly for hearing on motion of Plaintiffs by their attorneys, George B. McNabb, Jr., and Robert A. Parrish, for an order setting on for hearing Defendant's Motion for New Trial, and the Court having [44] been advised in the premises,

It Is Hereby Ordered that said Motion should be heard at the hour of 3:00 p.m. on the 25th day of May, 1951.

It Is Further Ordered That a copy of this Order

and the Plaintiff's Motion be forthwith served upon Defendant's attorney.

.....,
District Judge.

[Endorsed]: Filed May 24, 1951. [45]

[Title of District Court and Cause.]

ORDER

The plaintiffs were represented by Geo. B. McNabb; the defendant by Wm. V. Boggess.

Respective counsel had argument on the objections of the defendant to the Clerk's Ruling on the Cost Bill and the defendant's Motion for a New Trial.

It was Ordered that the Ruling on the Cost Bill of the Clerk be sustained; that the motion for a New Trial be denied.

* * *

Entered June 1, 1951. [46]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Douglas Heay, the above-named defendant, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Order overruling defendant's Motion for New Trial entered in this action on the 1st day of June, 1951, and the final judgment entered in said action on May 12, 1951.

/s/ WILLIAM V. BOGGESS,
Attorney for Appellant,
Douglas Heay.

Receipt of copy acknowledged.

[Endorsed]: Filed June 22, 1951. [47]

[Title of District Court and Cause.]

SUPERSEDEAS BOND

The undersigned as principal has filed notice of appeal to the United States Court of Appeals for the Ninth Circuit to reverse or modify the judgment rendered by the District Court for the District of Alaska, Fourth Division, in the above-entitled cause on May 12, 1951, and to supersede said judgment is required to give an undertaking, under seal, in the sum of Four Thousand Five Hundred (\$4,500.00) Dollars, conditioned for the satisfaction of the judgment in full with costs, interests, and damages for delay, if for any reason the appeal is dismissed or if the judgment is affirmed,

and to satisfy in full such modification of the judgment and such costs, interest, and damages as the appellate court may adjudge and award.

Wherefore, the undersigned Douglas W. Heay, as principal, and J. M. Stinnett and J. I. Weston, as sureties, appearing and submitting to the jurisdiction of the court, hereby undertake for themselves and each of them, their and each of their heirs, executors, administrators, successors, and assigns to comply with the condition as above set forth, and do further agree that, upon default by the said principal in any of the conditions hereof, the damages and costs, not exceeding the sum aforesaid, may be ascertained in such manner as this court shall direct; that this court may give judgment hereon in favor of any person thereby aggrieved against [48] them for the damages and costs suffered or sustained by such aggrieved party, and that said judgment may be rendered in the above-entitled cause or proceeding against all or any of them whose names are hereto signed.

The said sureties hereon hereby irrevocably appoint the clerk of court as his agent upon whom any papers affecting his liability may be served.

Signed, sealed and delivered this 22nd day of June, 1951.

/s/ DOUGLAS W. HEAY,
Principal.

/s/ J. M. STINNETT,

/s/ J. I. WESTON,
Sureties.

United States of America,
Territory of Alaska—ss.

I, J. M. Stinnett, and I, J. I. Weston, being each duly sworn, say: That I am a surety on the foregoing undertaking; that I am a resident within the Territory of Alaska; that I am not a counselor or attorney at law, marshal, deputy marshal, deputy marshal, commissioner, clerk of any court, or other officer of any court, and that I am worth the sum of Four Thousand Five Hundred (\$4,500.00) Dollars over and above all debts and liabilities and property exempt from execution.

/s/ J. M. STINNETT,

/s/ J. I. WESTON.

Subscribed and Sworn to before me this 22nd day of June, 1951.

[Seal] /s/ WARREN A. TAYLOR,
Notary Public for the
Territory of Alaska.

My commission expires 8/11/51.

Approved on the 22nd day of June, 1951.

/s/ HARRY E. PRATT,
District Judge.

Receipt of copy acknowledged.

[Endorsed]: Filed June 22, 1951. [49]

[Title of District Court and Cause.]

DESIGNATION OF RECORD

To the Clerk of the District Court for the Territory
of Alaska, Fourth Division.

You are hereby requested to prepare, certify and transmit to the Clerk of the United States Court of Appeals for the Ninth Circuit, with reference to the Notice of Appeal heretofore filed by the defendant, Douglas Heay, in the above-entitled cause, the complete record (including this designation) and all the proceedings and evidence in said cause, prepared and transmitted as required by law and by rules of said Court.

/s/ WILLIAM V. BOGGESS,
Attorney for Defendant.

Receipt of copy acknowledged.

[Endorsed]: Filed July 2, 1951. [40]

In the District Court for the District of Alaska,
Fourth Judicial Division

No. 6690

DEAN PHILLIPS, CHARLES GRAY, AND
JAMES KELLY,

Plaintiffs,

vs.

DOUGLAS HEAY,

Defendant.

TRANSCRIPT OF PROCEEDINGS

Appearances

GEORGE B. McNABB, JR.,
Of Fairbanks, Alaska,
Attorney for Plaintiffs.

ROBERT A. PARRISH,
Of Fairbanks, Alaska,
Attorney for Plaintiffs.

WILLIAM V. BOGGESS,
Of Fairbanks, Alaska,
Attorney for Defendant.

Be it remembered, that upon the 7th day of May, 1951, at the hour of 10:00 o'clock a.m., the trial of this cause came on regularly for hearing, plaintiffs and defendant represented by counsel, the Honorable Harry E. Pratt, District Judge, presiding:

The Court: This is the time set for the trial of the case of Phillips versus Heay. Counsel ready?

Mr. McNabb: Yes, your Honor. [1*]

Mr. Boggess: Ready, your Honor.

The Court: Very well.

Mr. McNabb: May it please the Court——

The Court: Mr. McNabb.

Mr. McNabb (Continuing): At this time your Honor, with the permission of the Court, I would like to file an amended complaint setting out a separate and alternative cause of action.

Mr. Boggess: Mr. McNabb, I presume you're alleging negligence now, is that correct?

Mr. McNabb: That's correct.

Mr. Boggess: If that's the case, your Honor, then I should like to have this matter continued until such time as I may submit an answer to the plaintiff's amended complaint and prepare myself on the basis of an action in negligence.

The Court: Have you seen the proposed (interrupted).

Mr. Boggess: I have not.

Mr. McNabb: It's just an allegation, your Honor, in the alternative cause of action that the aircraft which was—is the subject of this action was in fact operated in a negligent manner.

Mr. Boggess: I have examined it, your Honor. My request still stands because this will [2] necessitate my getting some expert evidence as to the

* Page numbering appearing at foot of page of original Reporter's Transcript of Record.

reasonable value of this aircraft which would not have been necessary under the first complaint.

(Document handed to court.)

The Court: Well, you're entitled to file an amended complaint, but the defendant is likewise entitled to have time to meet it. So, the present—the second amended complaint may be filed and an order vacating the present setting of the case will be entered.

Mr. McNabb: Your Honor, it would appear to me that at this time it will require us at least a full day to put on our proof in this matter and anything that the defendant has to offer will come thereafter and he will have more than one day in which to seek for and obtain any additional witnesses which he may feel that he needs to present to the Court. In this case, the principal witness of the plaintiff is Mr. Phillips who is employed by the Civil Aeronautics Administration at Naknek and any undue delay in hearing this case would cause him not only embarrassment but if he were required, it will be impossible for him to return for the hearing of this cause because he is the only person who is employed at Naknek or King Salmon, Alaska. I request the court therefore to hear this case not later than tomorrow if that seems reasonable to the court.

Mr. Boggess: If the Court please, [3] counsel is familiar enough with the law of pleadings and did not have to wait until this late date to amend this pleading and catch counsel for the defendant

by surprise. I don't think that one day's extension is adequate time for me to prepare myself, particularly with respect to the cross-examination of the plaintiff's witnesses, the cross-examination changing materially in view of the new theory upon which counsel is proceeding.

The Court: Well, there is a slight difference in the pleading. It seems to me that it involved the same principles originally as it does now. So, I will reset it for hearing tomorrow—for trial tomorrow morning at ten o'clock.

The Clerk: Court is recessed until 1:45 p.m.

(At 10:05 o'clock a.m., the trial of this cause was adjourned until 10:00 o'clock a.m., May 8, 1951.)

Be It Remembered, that upon the 8th day of May, 1951, at the hour of 10:00 o'clock a.m., the trial of this cause was resumed, plaintiffs and defendant being represented in court by counsel, the Honorable Harry E. Pratt, District Judge, presiding:

The Court: This is the time set for [4] trial in the case of Phillips versus Heay. Counsel ready to proceed?

Mr. Boggess: At this time, your Honor, I should like for the court's permission to file a motion to dismiss and in the alternative to strike the second cause of action in plaintiffs' second amended complaint and with the consent of counsel for the plaintiffs, I would be willing to argue that at this time.

The Court: Very well.

Mr. McNabb: If it please the Court, at this time I would like to have Mr. Parrish entered as co-counsel in this matter, your Honor.

The Court: May be so entered. All right, proceed, Mr. Boggess.

(Mr. Boggess presented argument to the court on defendant's motion to dismiss and motion to strike.)

(Mr. McNabb presented argument to the court resisting defendant's motion.)

(Mr. Boggess presented further argument to the court.)

The Court: Well, I'll deny the motion. However, you can raise the same question in your final argument of the case.

Mr. Boggess: At this time, your [5] Honor, with the court's permission, we will serve and file an answer to plaintiffs' second amended complaint.

The Court: Very well.

Mr. Boggess: And subsequent to that time, I should also like with the court's permission to move for a continuance of this matter for the grounds that I will then state.

The Court: You're waiting until after you file your answer?

Mr. Boggess: After I file my answer.

The Court: Very well.

Mr. Boggess: If the Court please, after this matter was adjourned or continued until today, I spent a considerable amount of time yesterday making

inquiry into two propositions. One is the effect of down drafts or vertical air currents on an aircraft in flight which I believe will subsequently be material to this cause and second, making an effort to ascertain the market value or other value of aircraft in order to prepare myself for cross-examination and if necessary to introduce it as part of my case. After the court was adjourned yesterday, I spent the remainder of the morning with my client and a witness for my client in the case inquiring into these matters. In the afternoon, I spent roughly three hours with Professor Ragle at the University of Alaska, inquiring from him of his knowledge of [6] vertical air currents from his experiences in flying in Alaska. After that, I spent my evening drafting the pleadings which I have filed, conversing with my client and making an endeavor to locate another witness. This consumed my time up until about 10 p.m. I have made rough notes and I have had no opportunity to reduce those notes into a workable plan of the presentation of my client's case. In view of the fact, your Honor, that normally in a situation like this where a man files an amended complaint with the permission of the court which necessarily he must first obtain, and in view of the further fact that rule 15 of the Federal Rules of Civil Procedure provides that the defendant shall have 10 days within which to answer such amended complaint unless the court orders otherwise, and in view of the fact that there still remains some work for me to do to reduce my notes and so forth to a proper working order, I

should like to request this court for at least three days' continuance.

Mr. McNabb: If it please the Court, it is not the desire of the plaintiffs in this action to prevent the defendant from having a fair and impartial trial and having his attorney have an opportunity to prepare his case. However, at this time I request the court that we proceed in this matter in that as I stated to the court yesterday, our principal witness must return to Naknek the place of his employment and if this matter is continued for three days at [7] this time, it is for all practical purposes the same as continuing the matter until next November or the next term of court. Now I can suggest this as an alternative method of proceeding. If the court believes that the defendant is entitled to a continuance, I request that we proceed at this time with the plaintiffs' case and then if the defendant desires some additional time before presenting his defense, then I think that we would have no objection certainly to the defendant being allowed any additional time. I am inclined to believe however that this defendant has not been surprised by the turn of events in this case though that is strictly a matter of opinion and perhaps he has been, but we do not believe your Honor that a continuance should be granted and request that it not be granted for the purposes set out.

Mr. Boggess: If the Court please, it is not my fault nor the fault of my client that counsel for the plaintiff has at the last minute submitted a second amended complaint. This action originally was com-

menced your Honor on the 24th of January, 1951. That original complaint contained a defective cause of action on contract. On April 19, 1951, an amended complaint, a first amended complaint was submitted in this matter. That first amended complaint contained a cause of action on a contract. Now, I am sympathetic with plaintiffs' position that this cause may have to be continued until next November because of Mr. Phillips' employment. [8] But where does the responsibility rest for any necessity of continuing this matter until next November? It doesn't rest with us. We weren't responsible for the pleading. We have never made any dilatory—done any dilatory moving in this cause. We recognized the sufficiency in the second cause of action—in the second complaint. We didn't move against that. We moved against the first one only because we had a substantial ground for our motion. Now, if counsel wants to present his case as he suggests and then give me sufficient time to present my case, that misses the point entirely, your Honor. The preparation of my case is important not only in presenting my case but in cross-examining the plaintiffs' witnesses. Therefore, the matter may be adjourned beyond 3 days as far as I am concerned, whenever Mr. Phillips can come back up here to try this cause, but I can't see why I should be forced to go to trial, to the prejudice of my client regardless of my own personal feelings, in this abrupt manner.

The Court: I think the matter presented by the pleadings before the last amendment were such

that the defendant was reasonably apprised of the whole situation and that he is not injured by this recent amendment. The motion will be denied. Proceed with the trial.

Mr. McNabb: May it please the Court——

The Court: Mr. McNabb.

Mr. McNabb (Continuing): Prior [9] to placing or calling our first witness, I should like a ruling by this court as to the law in the matter of one party impeaching a hostile witness of his own. Now, it is my intention to call as our first witness the defendant in this matter, Mr. Heay, and he naturally will be a hostile witness. Prior to the time that I put on other witnesses for the purpose perhaps of impeaching the testimony of my witness, Mr. Heay the defendant, I would like the court's ruling on the propriety of impeaching my own hostile witness.

The Court: There is only one reason that you can't impeach your own witness and that is if you try to show that the witness is so bad—his reputation is so bad that he is unworthy of belief in any condition. Now, you can impeach him in anything else. If he has made different statements or if his statements are untrue, you can impeach him, your own witness, as well as others. As a matter of fact, it is statutory in Alaska but that is the general rule anyway.

Mr. McNabb: It appeared to me, your Honor, that the Alaskan statute might limit the general rule a bit. The general ruling which is set out in section 916 of Wigmore—but I wanted the court's

ruling on that proposition prior to the time I placed this man on the stand.

The Court: Very well.

Mr. Boggess: If the Court please, [10] for the purpose of the record, I'll interpose an objection to this procedure. My objections are rather nebulous but I have them. Under the theory of the pleadings except for the fact of negligence, the witnesses of plaintiffs are sufficiently conversant with what occurred as Mr. Heay and I think some justification should be shown for such an unusual and rather surprising procedure of calling the defendant as the first witness for the plaintiff.

Mr. McNabb: Your Honor, at this time I move we exclude all of the witnesses from the court.

The Court: All right. Witnesses will be excluded from the court room until called to testify. Anybody who is a witness will remain out of the court room until called to testify.

(The witnesses left the court room.)

Mr. Boggess: Would the court give me the benefit of a ruling on that?

The Court: Oh, were you making an objection?

Mr. Boggess: I did.

The Court: Very well, it's overruled. (Pause.) Excepting, of course, parties are not excluded.

Mr. McNabb: Call Mr. Heay. [11]

DOUGLAS HEAY

called as a witness in behalf of Plaintiffs, having been first duly sworn, testified as follows:

Direct Examination

By Mr. McNabb:

Q. Will you state your name, please?

A. Douglas Heay.

Q. Where do you reside, Mr. Heay?

A. 905-5th Avenue, Fairbanks.

Q. What business are you engaged in?

A. I am a bar—partner in a bar.

Q. How long have you resided in Alaska, Mr. Heay?

A. Since, oh, '35 off and on. Not continuously.

Q. Are you the owner of an aircraft?

A. Not at the present time.

Q. Did you ever own an aircraft?

A. Yes, I have.

Q. When did you own that aircraft?

A. I think I bought it in May, of '48.

Q. How long did you have that aircraft?

A. Approximately a year.

Q. Did you sell it? A. Yes, I did.

Q. Are you a pilot?

A. I hold a private license. [12]

Q. How long have you held that license, Mr. Heay?

A. I got it in the fall of '46, I believe.

Q. When did you first start taking instructions as to how to fly an airplane?

(Testimony of Douglas Heay.)

A. Oh, it was in I believe July or August of '46.

Q. And how soon after you first started taking instructions were you granted a license?

A. I would have to check the dates on that. I am not positive. I imagine it was 2 months when I got my private license.

Q. Who issued that license, Mr. Heay?

A. My license was signed by Sparks who was the instructor and the examiner.

Q. And who issued the license?

A. Civil Aeronautics Administration, by virtue of his authority, I imagine.

Q. And have you had a license consecutively since the time that one was originally issued?

A. The license is always good as long as your medical is kept up.

Q. And has your medical been kept up?

A. Yes, it has.

Q. And did—was your license good in November of last year or September of last year?

Mr. Boggess: I will object to the [13] question, your Honor. I don't see its relevancy.

The Court: I couldn't understand you.

Mr. Boggess: I don't see its relevancy, your Honor. It is not within the issues being tried here whether or not this man was a licensed pilot.

The Court: Objection overruled.

Q. (By Mr. McNabb): Was your license good last year on September 20th? A. Yes, it was.

Q. Now, is that license effective now?

A. Yes, it is.

(Testimony of Douglas Heay.)

Q. It is in effect (interrupted).

A. As far as I know.

Q. Well, would you know if it were not in effect now?

A. Well, I imagine that you—from my understanding of Civil Air regulations, in order for—no one can take your license without an examination, without a hearing.

Q. Have you ever been notified that your license was suspended or revoked? A. No, I haven't.

Q. To the best of your knowledge, it is effective as of this date? A. It is as far as I know.

Q. Now, how long—how many hours do you have in single [14] engine aircraft, Mr. Heay?

A. I couldn't tell for sure. I approximate—I figure around 1500. I had log books burn up in the Fairbanks Air Service office and a portion of those hours I checked back when I was taking my commercial test and I also had log books burn when Wein burned up.

Q. But then to your best recollection, you have approximately 1500 hours?

A. Right around that.

Q. Now, you say you have had some commercial instruction? A. Yes, I have.

Q. From whom did you receive that instruction?

A. Well, this same Sparks and also my brother in law, George Richards.

Q. Are both of those people licensed (interrupted). A. Licensed instructors.

Q. For commercial license?

(Testimony of Douglas Heay.)

A. Yes. Al Clam was a licensed ground inspector, meteorology and navigation.

Q. Now, did you have navigation instructions, Mr. Heay? A. Yes, I have, a certain amount.

Q. Is that a normal part of the instruction for a commercial license? A. Yes, it is.

Q. How much navigation instruction did you have? [15]

A. Oh, I would say 25—30 hours.

Q. Did you have meteorology?

A. Yes, I did.

Q. Is that a normal part of the commercial license? A. Yes, it is.

Q. How much meteorology instruction did you have? A. I have only had 5 or 6.

Q. Who gave you that meteorology?

A. This same Al Clam.

Q. Why do you state you had only 5 or 6 hours of meteorology and 30 hours of—25 or 30 hours of navigation?

A. Because I couldn't attend the school at all times. I just happened to catch more navigation than the others. Part of the navigation I have had has been recent. I was figuring altogether with the number of navigation hours I've had.

Q. How many hours in the normal course of navigation, how many hours instruction?

A. For a commercial?

Q. Yes.

A. Oh, I imagine they figure around 30, total.

Q. You think you have had all of the navigation

(Testimony of Douglas Heay.)

instruction which is necessary for procurement of a commercial license?

A. No, I haven't. I am still studying.

Q. Is securing a commercial license dependent upon taking a written examination? [16]

A. Yes, it is.

Q. So, there's no set number of hours which you—which is required for studying, is that correct?

A. No. You have just to pass the test.

Q. Just so long as you can pass the examination?

A. That's right. Some people can do it in 30. It takes me a little longer.

Q. Have you taken an examination in that (interrupted). A. I have—no, I haven't.

Q. Have you taken an examination in meteorology? A. No, I haven't.

Q. How many hours is normally required for meteorology?

A. That I don't know. Twenty to thirty hours I imagine.

Q. You don't need as much meteorology instruction normally as navigation instruction, is that correct? A. I don't know.

Q. Normally that's true, isn't it?

A. That I don't know. I don't know what the average person takes—requires to absorb meteorology or navigation. You have to be able to pass your test.

Q. You put in more time on studying navigation than meteorology? A. Yes, I have.

(Testimony of Douglas Heay.)

Q. Is that—why? Is there any particular reason for that? [17]

A. Well, I was more or less interested in passing my navigation part of my class. Then I would go on to meteorology.

Q. Does it normally require as much instruction in meteorology as it does in navigation?

A. That I don't know.

Q. You stated that you need normally 20 to 30 hours?

A. That's just an estimate. I don't know. A man that is maybe a little faster on the brain could pass it in 10 hours. I don't know. It's mainly just dry study, meteorology. Navigation is a lot of problems to work with.

Q. You found it more interesting studying navigation? A. Yes, I have.

Q. But you have had about 5 hours you say of meteorology?

A. I imagine so. Four or five hours. It has been '46 or '7 since I've had it.

Q. Do you recall the nature of that study of meteorology?

A. Oh, we were starting on fronts.

Q. What do you mean by "fronts"?

A. Well, movements of cold or warm air masses, movements of air itself, different phases, just more or less of going into meteorology as a whole before starting to bite into it.

Q. What did you learn about movements of the air over the ground?

(Testimony of Douglas Heay.)

A. Oh, I don't know. I learned a little, not too much. [18]

Q. Well, what did you learn?

A. Oh, about—(pause)—oh, God, I don't know.

Q. You say you started on how the air moved over the earth?

A. The movement of air as a whole. Air moves from more or less towards the poles and back toward the equator and down to the earth again. We were studying movements of large air masses such as fronts, cold and warm fronts and how to forecast the weather by reading different cloud formations and movements of these same fronts. I can't say I absorbed them all. That's why it's a little difficult for me to describe it.

Q. Well, did you study how the air moves in a particular location?

A. Well, there are ground winds and winds aloft; turbulence due to air movements along the ground or over warm ground or in mountain passes and around mountains, such as that.

Q. Well, how does air move around mountains?

A. Well, I'll tell you. Professor Ragle, he would like to know how air moves around mountains himself and he has been studying it himself.

Q. What is turbulence?

A. Turbulence is more or less vertical movements of air that you could encounter either in open fields or in mountains. As to their exact cause, I don't know.

Q. Is there any—will turbulence normally occur

(Testimony of Douglas Heay.)

any more [19] frequently in one location than in another?

A. Yes, that's been known in Alaska in certain passes or if there is any movement of air at all you find turbulence and there is causes that I don't know. There are windy passes. Isabel Pass which is in the vicinity where I cracked up has been known for a certain amount of turbulence.

Mr. Boggess: Your Honor, at this time I am going to object to any further questioning along this line. Mr. McNabb is particularly interested in vertical air currents and turbulence and fronts and data of that nature. I suggest he get himself an expert witness to testify. There's no showing that this man is a qualified expert. He is merely a private pilot. He's had 6 hours in meteorology. I think there are other people who could better testify.

The Court: You think it is necessary to go into so much detail on that subject?

Mr. McNabb: Your Honor, I would like to know what this man knows about air currents or what he should have known after studying for 6 hours.

The Court: You think this is necessary to your case, do you?

Mr. McNabb: Yes, I do, your Honor.

The Court: Very well. Objection overruled. [20]

Q. (By Mr. McNabb): Now, did you learn in your course of study how air currents move along the surface of the earth?

A. To a certain extent, yes.

(Testimony of Douglas Heay.)

Q. What's the general rule concerning the air movement along the surface of the earth?

A. Well, you have a prevailing wind or a movement of air with fronts and they can be disturbed by running over warm earth in open fields or contours of the earth itself will contort that air and cause turbulence or up drafts or down drafts.

Q. Now, did you—have you learned during your course of study about anything concerning the movement of air currents to conform to the contours of the earth? A. To conform to the contour?

Q. Yes.

A. Movement of air along the ground, I don't think it would conform. It would run into a hill. It would move up a hill and go on up above the hill. It wouldn't necessarily conform I believe. If you get on the lee side of a hill, there possibly could be a down draft but you get on the other side of the hill or more or less fly along it and catch an up draft when you get on the other side.

Q. What would depend or what would determine whether there is going to be an up draft or a down draft?

A. Well, I think the velocity of the wind, the hill itself. [21] There's another factor. Maybe the wind has been split up by going through other passes.

Q. Would the direction of the wind itself have any effect on that?

A. Well, if you're speaking of an area more or less open and there's one or two hills, possibly the

(Testimony of Douglas Heay.)

direction of the wind would. When you're flying in mountain passes, why it's pretty hard to tell from which direction the wind is going and to come from at all times.

Q. Well now, you stated that—well now, I'll ask you this. Is there always an up draft on one side of a hill and down drafts on the other side?

A. Not that I know of.

Q. Well now, you were telling me a moment ago that you might fly along a side here when there would be an up draft on that side and on the other side there would be a down draft.

A. I would say it would—could happen most of the time.

Q. Well then (interrupted).

A. But there is also so many factors that could come in there that you're not—you can't go by it. I mean, if you're going to fly that way, why it wouldn't be a very good policy.

Q. What are the factors then, Mr. Heay, to determine that?

A. Well, that's something with my limited amount of knowledge I don't know all the factors. Like I say, contours, [22] temperature, movement of the general air mass itself and the particular portion of the country you're flying over. I think there's a lot of them there that I don't know quite all about it. Like I say, some of these people are still learning. They're still trying to find out.

Q. Well then, you can't state that you have any

(Testimony of Douglas Heay.)

positive knowledge as to the air currents in and around hills, is that right?

A. No, I wouldn't state that.

Q. Well then, what is the extent of your knowledge of air currents?

Mr. Boggess: I am going to object again, your Honor, to this repetitious hammering at this witness and unnecessarily making a lengthy record. This man has told Mr. McNabb as much as he knows about air currents.

The Court: Objection sustained.

Q. (By Mr. McNabb): Mr. Heay, will we find more turbulence in mountainous area than over flats?

A. That all depends. You can take your open plains of Kansas (interrupted).

Q. Let's confine it to Alaska.

A. Well, you can take over the Tanana Valley. If you have a good hot day and the sun is beating down, you got flats more or less warmed up and you can take off from here and go [23] across the flats and you will find a lot of turbulence there at low altitudes. It would be caused by the air being warmed up by the heat from the trees themselves. I have encountered turbulence across flats before.

Q. That is caused by the warming of the air close to the water, is it?

A. To the ground itself.

Q. Well now, I believe you didn't answer the question though. Can you tell—can you normally

(Testimony of Douglas Heay.)

expect more turbulence and more air movement over mountainous areas than in flat country?

A. I suppose you could.

Q. Now, is it normal to expect then that when you are flying in mountainous country, is it normal to expect up drafts and down drafts?

A. If there is any great air movement, yes.

Q. Well now, what do you mean by "any great air movement"?

A. If there is a flat calm, you can fly through and you don't necessarily have turbulence if there is no air movement.

Q. But then how frequently do you find flat calm in mountainous areas?

A. Well, I wouldn't say too often. It is very seldom.

Q. It is very rare, isn't it?

A. That's right. [24]

Q. So, it's—you can almost say that you normally expect some turbulence in mountain areas?

A. That's right.

Q. And up drafts one place and down drafts another?

A. Right.

Q. And down drafts and up drafts depend upon the movement of the air, that is, the currents of the air flowing in and around those mountains?

A. Well, the direction of the wind, the temperature (interrupted).

Q. But then there is no standard rule is there of what's going to determine where you can expect an up draft or a down draft?

(Testimony of Douglas Heay.)

A. No. Although through a course of flying through some of these passes for several years, I have more or less known where some of the down drafts are. I know if there is any movement of air practically from any direction at Black Rapids you're going to have quite a down draft and a little ways up there is sometimes—sometimes you get a movement.

Q. Well now, where on up the valley?

A. Well, there's a split there where you can go off into the Tangle Lakes. It's where the valley splits and you can go up to Tangle Lakes or on over Summit Lake and on down to Paxson.

Q. And in that particular area, there is normally turbulence, [25] is that right?

A. You will have turbulence in there if there is any air movement.

Q. Well now, tell me, is this second place that you just mentioned over Summit Lake?

A. No, it's going just before you reach Summit Lake, going South.

Q. Which direction? A. South.

Q. Going South? But now, as you go down that pass all the way under normal flying conditions, won't you find that area is turbulent?

A. Well, lots of times you can fly down over a pass and you won't find too much turbulence.

Q. And that is flying at what altitude, Mr. Heay?

A. Oh, anywheres from 3,000 to 5,000 feet.

(Testimony of Douglas Heay.)

Q. Have you ever flown lower than that through the pass?

A. Yes, I have, down through the pass.

Q. What did you find the situation to be at lower altitudes, Mr. Heay?

A. Oh, I have encountered little less turbulence.

Q. Down lower?

A. That's right. I've been dropped—I know at one time I lost 1200 feet coming past Rainbow Mountain and I had this Sparks with me. We was in a Taylor Craft and we encountered [26] some pretty severe turbulence. We lost 1200 feet. When we got down lower, we encountered no more turbulence at all.

Q. What caused you to lose the 1200 feet?

A. Down draft.

Q. Did it drop right out from under you?

A. Just about.

Q. For 1200 feet? A. Yes.

Q. Then she caught and took hold and proceeded? A. That's right.

Q. Mr. Heay, how many times have you flown in and out of Paxson Lake or Paxson Lodge?

A. Paxson Lake and Paxson Lodge are two different places. There's a landing strip at Paxson Lodge.

Q. How many times have you taken off Paxson Lake?

A. That I don't know. I would say at least fifty.

Q. How many times have you taken off the landing strip at Paxson Lodge?

(Testimony of Douglas Heay.)

A. Oh, four, five times.

Q. Do you have any normal course of procedure in taking off from the lake?

A. Usually you take off up wind in a float plane.

Q. Have you found any prevailing wind current in that—at the lake?

A. Any prevailing wind? [27]

Q. Yes. A. No, I wouldn't say so.

Q. One time it will be from the north and another time from the south?

A. That's right, and also I have taken off in one direction from Paxson and landed at Swede Lake which is about a 25 minute round trip and had to land in the other direction coming back into Paxson because there had been a wind shift.

Q. How frequently do these wind shifts occur?

A. That I don't know. I know what I have encountered at times.

Q. Have you ever started to take off in one direction and the wind stopped and you had to take off in another direction? A. Yes, I have.

Q. And fifty times you have taken off from there you found the wind to be variable?

A. Yes.

Q. Exceedingly so?

A. That's right, unless you happen to get up there and there was a 50 mile gale blowing from one direction. It would probably last for seven, eight days which it does and I have tied up the ship and stayed a few days at times.

(Testimony of Douglas Heay.)

Q. Due to the wind?

A. That's right, excessive winds.

Q. Now Mr. Heay, would you say that the Paxson Lake area [28] is one in which there is no normal wind condition?

A. Not to my knowledge. I mean, as many times as I have been out there, I would say maybe I have been in there 3 different days in a row and the wind was blowing in the same direction, but I don't know how you would go around finding out what is the prevailing wind. They built Week's Field out there and if that's built according to prevailing winds, why somebody's hay-wire.

Q. But the point is, you say you have been in and out of there fifty times?

A. Over the course of 3 years.

Q. And the wind as you found it down there (interrupted). A. Is variable.

Q. They are exceedingly variable. One time it happened to change in 20 minutes and you had to come in from another direction?

A. I have had a change in 25 minutes that I know of.

Q. You have testified that in your experience at Paxson Lake, you have attempted to take off in one direction and while so attempting to take off the wind had shifted and you were required to turn and take off in the other direction.

A. That I have done, but that also involves a little time. I don't necessarily say it happens as fast as you say it. By the time you taxi down the

(Testimony of Douglas Heay.)

lake a minute or a minute and a half and decide not to burn your engine up and you can't [29] get off, you might sit there a few minutes or let the engine cool down. When your head temperatures are up and your lube oil temperature is high, you let your engine cool. It is very simple to burn up an engine in a float ship. Or you might put to shore and let—like I did just before I had this crack up and let people out if you were overloaded and this time the wind had also shifted. It doesn't happen just whim bang. It takes a little time but to my knowledge I have known where it has changed 180 degrees in 25 minutes. This particular day I don't—I wasn't keeping track of the time. One day I had made a trip and I knew how long it took me. It took me approximately eleven minutes each way from Paxson Lake to Swede Lake.

Q. And in that length of time how much did the wind change? A. 180 degrees.

Q. Turned clear around?

A. Just shifted altogether.

Q. Is that the same thing that happened on the day of the crash?

A. Yes, to my knowledge it had. I had attempted to take off in one direction and there was a fairly good chop on the lake.

Q. The water was rough?

A. Not rough, just a little chop which did make it nice for a float take off and I couldn't get out. By the time I [30] warmed the ship up and taxied up around the point, the wind had died down a

(Testimony of Douglas Heay.)

great extent and after attempting to take off for approximately a minute, I found I couldn't so I taxied back to Sportsman Lodge and unloaded one passenger and by the time I had gotten back and unloaded the man and I turned the ship around, the wind was blowing from the north then.

Q. Was it choppy then?

A. No, it was not quite choppy. There was a ripple in the water.

Q. How much variance in velocity would you say?

A. That I don't know. I would say it was 15 miles an hour. It had been from the south and it was blowing approximately the same and possibly a little more from the north. I mean, with no—there wasn't too good an indication to give you any indication of the velocity.

Q. That is just basing it on your own judgment?

A. That's right.

Q. How many minutes would you say it required to make that 180 degrees shift on that particular day?

A. Well, that I don't know. I had gone quite a ways down the lake and I took my time taxiing back. We unloaded Ernie Hubbard. I don't know just how long it did take. I would say oh, not less than 20, 25 minutes. I mean, you're not—I lost the wind I had and couldn't get out and I wasn't [31] watching the time so much. We weren't in an enormous hurry.

(Testimony of Douglas Heay.)

Q. How far down the lake did you taxi that day when you tried to take off?

A. Oh, I went quite a ways. I would say little better than a mile, maybe a mile and an eighth or a tenth.

Q. Just little over a mile? It took you three or four minutes?

A. No, it didn't take that long. It shouldn't have.

Q. Did you rev it up and try to take off?

A. Going down that mile?

Q. No, coming back. A. No.

Q. You just lost the wind and didn't even try to get off.

A. No, not with the load I had. The engine warmed up in that run, which a float plane will do, so all I wanted to do is cool the engine down again and unload this passenger.

Q. So you went down the lake and lost the wind and turned around and came back to the lodge, is that right? A. That's right.

Q. That shouldn't have taken more than 4, 5 minutes at the most, should it?

A. Well, I don't know. It takes a little longer sometimes.

Q. Well, would you say it took 15 minutes to go down and turn around and come back an (interrupted). A. Possibly so. [32]

Q. (Continuing): —let your passenger out and then took off?

A. Probably took me 15 minutes to get back to

(Testimony of Douglas Heay.)

the Sportsman Lodge and I let the passenger out and turned the ship around and pulled out passed the point and had to—I had the wind from the north in the meantime.

Q. You have any difficulty getting off that time?

A. No.

Q. Was there any wind blowing then? You say it had changed?

A. There was a wind from the north, yes.

Q. You took off into the north? A. Yes.

Q. Now, what day was this, Mr. Heay?

A. I don't remember the exact date. It was in September. I think it was (interrupted).

Q. Well, it is alleged in the complaint that this crash took place on the 20th day of September.

A. It was the last day of moose season. Yeah, it was.

Q. Last day?

A. Last day. That's what I was trying to figure from.

Q. Do you recall what time it was when you took off down there?

A. Well, it was around 9 or 9:30 in the morning, I believe.

Q. And who was with you on that trip?

A. Jess Bachner. [33]

Q. Are you personally acquainted with Mr. Bachner? A. Yes.

Q. What is his occupation, do you know?

A. He works at Fairbanks Air Service. I believe he's a part owner or a full owner. I don't

(Testimony of Douglas Heay.)

know his status out there. I know Jess has been running it more or less. I think he owns it.

Q. Is he a pilot?

A. Well, yes. He has a private license. He is at least that. Maybe he is a commercial pilot. I don't know.

Q. Now then, Mr. Heay, you had flown this particular airplane from Fairbanks to Paxson?

A. Yes, I had.

Q. Did you go anyplace else?

A. Yes, we went over to the small lake just off the McLearn River and we landed at Paxson and stayed overnight and it was next morning that this accident happened.

Q. Now on what day did you receive this airplane from the owner?

A. It must have been the 19th.

Q. Where did you take it off from?

A. Chena Slough.

Q. And you flew directly where?

A. Right through this—I don't know whether we landed at Paxson first or not. I think we went back to this small [34] lake and then back to Paxson. I wanted to show Ernie Hubbard the Cessna that was up there.

Q. Whose airplane was that?

A. Malloy's. F. Malloy. I don't know his first name.

Q. And then you landed that evening at Paxson Lake? A. Yes.

Q. You stayed all night? A. Yes.

(Testimony of Douglas Heay.)

Q. And the next morning then you started to take off in one direction, the wind shifted and you wanted to drop a passenger? A. Yes.

Q. Who was with you?

A. Jess Bachner and Ernie Hubbard.

Q. And which one of those men did you let out of the plane? A. Ernie Hubbard.

Q. Then how far did you taxi then to get off?

A. Well, we made a normal take off run then. I would say about 50—oh, now wait—(pause)—I don't know, 40 seconds, 45 seconds.

Q. Were you loaded heavy?

A. No. Jess Bachner and myself and I believe we had one full tank of gas and the other tank was one-quarter full.

Q. How much gear did you have? [35]

A. We had one small box with some rivets and some tools of Jess Bachner's and his rifle and a pair of cover-alls.

Q. How much gear do you suppose—what was the weight of the gear that you had?

A. Oh, I don't believe counting the rifle and all it was 25 pounds.

Q. How much do you weigh (interrupted).

A. I weigh (interrupted).

Q. (Continuing): —or how much did you weigh at that time?

A. I weighed about 185 then.

Q. Do you know how much Mr. Bachner weighed at that time or approximately how much?

(Testimony of Douglas Heay.)

A. No, I don't. Somebody mentioned yesterday he weighed 230 or 244 pounds.

Q. Pretty chubby, huh?

A. Well, he's built pretty close to the ground. He is husky.

Q. How much did the gas weigh that you had in there?

A. Well, the 18 gallons in the one tank, I would say around 225 pounds.

Q. Do you know what the load limit of that plane was with that amount of gasoline?

A. No, I don't but I felt that I was well under the load limit. [36]

Q. Did you have any trouble getting off?

A. The second time, no.

Mr. McNabb: Can we have a 10 minute recess at this time, your Honor?

The Court: Yes, we'll take a 10-minute recess.

Clerk of the Court: Court is recessed for 10 minutes.

(At this time, a short recess was taken and the trial of this case was thereafter resumed.)

The Court: Counsel ready to proceed with the trial of this case?

Mr. McNabb: Ready, your Honor.

The Court: Very well.

Q. (By Mr. McNabb): Now, how far did you have to taxi before you got the plane up on the step that day, do you recall? A. No, I don't.

(Testimony of Douglas Heay.)

Q. Do you recall how far you had to taxi to get it airborne?

A. Offhand, I had got her on the step and was in the air.

Q. Did you have any difficulty getting it off?

A. Not the second time I don't believe. I don't recall any difficulty.

Q. Now, what did you do when you got the airplane in the [37] air?

A. Turned and went south down the lake and made another turn and came back north to get altitude.

Mr. McNabb: Mr. Clark, what has become of the big blackboard we had?

Clerk of the Court: It is right over yonder. Oh, the blackboard? Oh, it's in the other room. It's not here.

(At this time, the Clerk of the Court left the courtroom and returned with the blackboard.)

Mr. McNabb: Where is the most advantageous place to put it?

Mr. Parrish: I think there in front of the pitcher would be all right, George. Is there any special place you want the board to see?

The Court: Well, that's all right where it is. Mr. Boggess can come over there too so he can see it.

Q. (By Mr. McNabb): Now, Mr. Heay, will you describe for—come down here and draw us a diagram, please, of that lake.

A. I am not a very good artist.

(Testimony of Douglas Heay.)

Q. You better make this north, now.

A. This is more or less the north end of the lake. It's 12 miles long. [38]

Mr. Parrish: Put it as heavy as you can so the court can see it.

The Witness: This is the north end of the lake.

Mr. Boggess: Your Honor, would it be possible to put a large sheet of paper there? If you're going to have this testimony graphically illustrated, you would have something to preserve.

The Witness: I can make an illustration.

The Court: I think your suggestion is a good one because you can't put a blackboard in evidence.

Mr. Boggess: That's correct.

The Court: It would be better to have it on a piece of paper.

Mr. McNabb: Well (interrupted).

The Witness: We can leave it there and I will re-copy it.

Mr. Boggess: I am rather interested in having this matter down myself because it will be of assistance to me later on in my case and I have no objection except to preserve it.

Mr. McNabb: Your Honor, may I suggest we go ahead on the blackboard and then we can have Mr. Heay trace it and have some other person trace it, this same map or another one. [39]

Mr. Boggess: I don't have any objection to that.

Mr. McNabb: As long as we get a diagram of what occurred.

The Court: Very well.

(Testimony of Douglas Heay.)

The Witness: I don't know just exactly the outline of that lake. It is 12 miles long. It makes a curve in there. This is Sportsman Lodge.

Q. (By Mr. McNabb): Would you put the highway on please?

A. This little stream, it comes close to the highway. This would be Sportsman Lodge and I attempted to take off south, couldn't do it, dropped my passenger to Sportsman, dropped him off and swung out here and took off to the north.

Mr. Boggess: At this time, I would like to suggest that you make directions in one corner of that map and indicate north and south.

Mr. McNabb: Well, he has. He's got north up above.

Mr. Boggess: Has he?

The Witness: Your question was what did I do after I took off.

Q. (By Mr. McNabb): Well, if you will please place on that map in reference to the lake your exact pattern. [40]

A. Here's my take off. I swung up here south again and we built up altitude and then swung over here and gained altitude and we came across here. This is where I hit the down draft below this mountain. I was attempting to cross the saddle here or whatever you want to call it.

Q. I believe there is another peak on there.

A. There is a hump of some kind. You mean down in here? It sits back further actually and there is in fact just below it, there's a small canyon

(Testimony of Douglas Heay.)

that runs in there, if you are acquainted with that area—right in there—and below this hill is where I caught the down draft. I was going towards the ridge at an angle more or less of southwest.

Q. Uh-huh.

A. I found myself in a down draft and turned back to the lake with the nose down and still at full throttle and climbing throttle at all times here after take off and that is when I hit the ground in here approximately.

Q. Now, let me review your testimony. You started—when you began your take off, you started in a northerly direction?

A. Yes.

Q. Off the lake?

A. Off the lake.

Q. And as soon as you became airborne, you made a 180 degree right turn? [41]

A. Left turn—not as soon as I became airborne. I took off from this point and went up beyond the fringe of the lake here.

Q. You got beyond the fringe of the lake, over the shore then?

A. I gained altitude before I made my first turn.

Q. Well now, how much throttle did you have?

A. Full throttle, take off throttle which I was advised to use, and high pitch.

Q. And how fast were you climbing?

A. That I don't know. I wasn't watching the air speed indicator too closely.

Q. What was the angle of incline, that is, how many feet per minute were you climbing?

A. At that time? Oh, I would say two, three

(Testimony of Douglas Heay.)

hundred feet a minute. I believe—all I know is the feel of the airplane.

Q. You made a 180 degree turn to the left?

A. Yes.

Q. And came back and down over the lake again?

A. That's right, down along here, going south.

Q. How far did you fly south?

A. Oh, I would say $2\frac{1}{2}$ or 3 miles.

Q. And then you made another 180 degree turn to the left, is that right? [42] A. Yes.

Q. And you flew—did you cross over the highway?

A. Well, I don't remember. I doubt if I did. That's quite a wide lake. I don't show it here. In fact, over right by here there's hills along in there so I was staying clear of those.

Q. So you flew the second time approximately the same course so far as the turn is concerned as the first time?

A. Well, I turned a little bit short.

Q. You turned shorter? A. Yes.

Q. Now, what was the purpose of making that circle?

A. Well, I had by going out and coming back down and coming around, I figured that I had gained sufficient altitude so I can make my turn a little bit shorter and get across that ridge.

Q. How high were you over the lake?

A. I would say just about a thousand feet.

Q. Over the lake?

(Testimony of Douglas Heay.)

A. Over the lake itself. The elevation of that lake I think is 2500.

Q. Now then, as you took off and as you were flying that plane, was the motor operating properly?

A. Yes, it was.

Q. Did it continue to operate properly as you made that [43] turn?

A. Yes, it did. I never noticed any engine failure or what you might call engine failure in any way on the aircraft.

Q. Well now, did it respond to the controls? Did the controls respond properly as you made your turn? A. Yes, they did.

Q. And had the motor operated properly when you flew the plane from Fairbanks to Paxson?

A. Yes.

Q. And had the controls operated properly during that time? A. Yes.

Q. And the plane was always responding to those commands, had it?

A. Yes, it did. There is no defect in the engine or the aircraft so far as I know.

Q. Now then, you turned—made a second 180 degree turn and what direction roughly did you approach that hill?

A. Well, I would say a southwesterly direction. If this were true north here (indicating) I would be more or less (indicating).

Mr. McNabb: Your Honor, perhaps we can replace the diagram with this—with these maps.

(Testimony of Douglas Heay.)

The Court: Very well.

Mr. McNabb: Don't erase it though. [44]

The Witness: No, I wasn't.

The Court: I think we better use this board over here for the maps.

Q. (By Mr. McNabb): Now, do you know, Mr. Heay, what this "X" at the "B M" represents?

A. No, I don't.

Q. Well, is that "X" at the approximate location of the Sportsman's Lodge?

A. It looks—it's just about it. Sportsman's Lodge is on a little point out there.

Q. Now, what is the elevation of the Gulkana Lake or as we call it, Paxson Lake?

A. I believe it's 2500 feet.

Q. Is this figure here, 2579 feet, do you know what that is supposed to represent?

A. Approximately—possibly the elevation. I am not familiar with this type of chart.

Q. On your diagram on the blackboard, can you indicate to us the peaks of the hills as shown on this map?

A. The peaks of this one I attempted to do. Whether I succeeded or not, I don't know.

Q. Now—we will mark this peak "X." Is that the hill which is marked as 5280 feet elevation?

A. That's the one I attempted to put on the blackboard. [45]

Q. That's "X."

A. I attempted to mark that mountain on the

(Testimony of Douglas Heay.)

blackboard. Then I attempted to show what I call the saddle coming in there.

Q. Now Mr. Heay, I will ask you to mark on this map with an "S" where the saddle is?

The Court: Do you have any colored pencils, Dixie?

The Witness: That would be right in here.

Q. (By Mr. McNabb): Put an "S" in there.

A. In other words, you got a high peak there and another one in there and looking at it from eye level it looks like a saddle.

Q. Now, where is the second high peak?

A. This is the high peak near the lake.

Q. That's "X"?

A. Yes, and this is the little hill on top.

Q. Well, mark—you have marked the high peak with an "X."

A. You marked it. I marked the saddle.

Q. Now, mark the second high peak with another "X." Make it a double "X." Mark the second high peak.

A. On the lake?

Q. Well, in your previous testimony you said there is one [46] high peak which we have designated and then another second high peak.

A. Not a high peak. There's another one here though.

Q. That's it.

Mr. Parrish: How was that one marked?

The Witness: Double "X."

Mr. McNabb: Double "X."

Q. (By Mr. McNabb): Now then, if I under-

(Testimony of Douglas Heay.)

stand your testimony correctly Mr. Heay, you took off from Gulkana Lake or Paxson Lake in a northerly direction? A. Yes.

Q. Made one 180 degree turn (interrupted).

A. To the left.

Q. To the left, and came then south (interrupted).

A. Yes, but not over here. We are still over the lake.

Q. Following the lake? A. That's right.

Q. Then you made a second 180 degree turn?

A. Right.

Q. Going again northward in the same direction in which you took off? A. That's right.

Q. Then you made a 90 degree turn to the left or more?

A. Little better than 90. A 120. [47]

Q. And approached these hills (interrupted).

A. At an angle, heading for this saddle.

Q. Now then, will you draw on that map—not necessarily staying on the lake because that's going to make us a little close (interrupted).

A. The same take off like I did on the board?

Q. Yes.

The Clerk: Here's a red and blue and green pencil (handing to Mr. McNabb).

Mr. McNabb: I would be glad to accept a gift from you.

The Witness: Here's what I done.

Mr. McNabb: The witness is tracing on the map an illustration of his flight in a red pencil.

(Testimony of Douglas Heay.)

Q. (By Mr. McNabb): Now then (interrupted).

A. I'm too far over here now.

Q. You were approaching the hills in a generally southwesterly direction, is that correct?

A. Yes, if I had the lake as laying in my mind north and south.

Q. Now, can you mark on here with a blue pencil the approximate place where you struck the hill?

The Court: What is the scale of that map, Mr. McNabb? [48]

Mr. McNabb: One inch to five miles, your Honor—no, that's wrong. One and a quarter inches to five miles, your Honor.

The Court: All right.

Mr. Parrish: Can we designate that point with some letter?

Q. (By Mr. McNabb): This is the place of your crash? A. Approximately.

Q. Will you mark that with a "C" for crash? Now then, Mr. Heay, you approached these hills having left the lake at a generally southwesterly direction? A. Right.

Q. And were you climbing at that time?

A. I was still in a climbing attitude and still climbing also.

Q. And do you know how rapidly you were climbing?

A. No, I don't. All I know is that according to my knowledge, I was climbing at a speed—well, I was climbing and going at enough rate of speed that with the distance I had left to go to reach the

(Testimony of Douglas Heay.)

saddle, I would have plenty of clearance by the time I reached the saddle.

Q. But you don't know how rapidly you were climbing? A. No, I don't.

Q. Did you know at the time?

A. No. [49]

Q. Was there an instrument in that aircraft which indicated the rate of climb?

A. I don't believe there was. I am not sure now.

Q. Did you look at any instrument which was in the airplane to determine how rapidly you were climbing?

A. No. I looked at the air speed indicator a time or two.

Q. What did the air speed indicator say? What was the reading of the air speed indicator?

A. Well, the reading—I think it was around 70, right pretty close to 70 indicated.

Q. And in reference to the time of the crash, when did you look at that air speed indicator?

A. That I couldn't swear to. I was a little bit busy about that time.

Q. Well, was it just fairly shortly prior to the time when the plane crashed or was it when you went out over the lake?

A. That I can't swear to. I don't—you don't just keep track of things like that. Just like you know the last time you look at the speedometer of your car you're driving and you look at it and you don't pay too much attention to it or whatever it

(Testimony of Douglas Heay.)

reads unless it reads wrong. Then you do something about it.

Q. The last time you looked at you air speed indicator, it was reading 70 miles an hour or so? [50]

A. If I remember rightly, it read 70 and the airplane felt fine.

Q. And it was responding and doing everything properly, is that right? A. That's right.

Q. And flying properly?

A. Yes, it was, as far as I know.

Q. Now then, as you approached those hills, you say had you continued to climb you would have had enough altitude to get over the saddle?

A. That's right. At the altitude I was in or the ship was in and my rate of climb and my distance from the saddle, barring the down draft I ran into, I would have had sufficient altitude and been in a safe position—I would have had proper altitude and—I don't know how to say it, but I would have been in the position I wanted to be in at any rate.

Q. That is, if the plane had continued to climb at the rate of 70 miles an hour, by the time you reached the saddle you would have had enough altitude? A. That's right.

Q. Does that map indicate the height of the mountain which we have designated as "X"?

A. Yes, 200 foot graduation.

Q. Will you tell us what that is please?

A. Oh, 5,280 feet. [51]

Q. It isn't 5,500 feet?

(Testimony of Douglas Heay.)

A. I said 5 thousand.

Q. 5,280? A. Right.

Q. Does it indicate the height of the mountain which we have marked double "X"?

A. Just a minute. Let me figure this. Don't write this down. Starting at the lake the only elevation I have is 2979 and it has here a 200 foot graduation and (pause) two, four six, eight—two, four, six, eight—according to this, it would be 3,579 feet, the one marked double "X."

Q. That's the mountain—the hump?

A. The double "X," yeah.

Q. How high is that saddle?

A. Well, it's one graduation less. It is 200 feet less.

Q. Now, is that the same as is indicated on this map?

A. This doesn't have any elevations I believe. The graduations go by colors and it shows over 5,000 feet.

Q. Just shows over 5,000 feet? Now Mr. Heay, as you recall, how much elevation did you have over the lake as you made your second turn or you approached—your approach to the hill?

A. I figured pretty close to a thousand feet, pretty near 3,500 feet.

Q. Well then what is the elevation which this map [52] discloses to be the elevation of that saddle?

A. What was it now? 3400 wasn't it, or 3300?

(Testimony of Douglas Heay.)

Q. 3379, isn't it?

A. Oh, yeah, reading for—reading from this. Yeah, 3379 feet.

Q. So, it is 800 feet higher than the lake?

A. Well, I would say so.

Q. Now that of course is at the low part of that saddle, isn't that right, Mr. Heay?

A. That's right. I hadn't reached there as yet.

Q. And you weren't approaching that low part perpendicularly to it, were you?

A. What do you mean, straight at it?

Q. Yeah. A. I was angling towards it.

Mr. McNabb: Mark this.

The Clerk: Plaintiffs' identification number one.

(At this time, a photograph was marked for identification as Plaintiff's Identification 1.)

Q. (By Mr. McNabb): Now Mr. Heay, I will show you plaintiffs' identification number one and ask you if you know what that is.

Mr. Boggess: May I examine that identification first, your Honor? [53]

The Court: Yes. We will use that policy all the way through. Show the other attorney first (interrupted).

Mr. McNabb: Very well, your Honor.

The Court (Continuing): Before the witness.

Q. (By Mr. McNabb): Now, do you know what that is?

A. It looks like the peak at the north end of the lake.

(Testimony of Douglas Heay.)

Q. Wait a minute. What is it?

A. I say it looks like the peak to the north end of the lake.

Q. Isn't that a photograph?

A. Yes, it's a photograph.

Q. Do you know what it is a photograph of?

A. Well, some water and a hill.

Q. Now, does that appear to you to be a photograph taken across Paxson Lake and toward the high peak which is represented on this map with an "X"?

A. Yes, it looks like it to me. I don't know—I don't know whether it looks like it was taken from Sportsman or not.

Q. No. I just said if it appears to be taken across the lake.

A. Taken at an angle, yes.

Q. Now Mr. Heay, you will observe on that map an ink spot. [54] Do you see it?

A. Uh-huh.

Q. Now, does that correctly represent the approximate location of the crash in reference to the peak?

A. I would say it looks pretty close to it. I have never seen the crash.

Q. You mean you have never returned to the scene of the crash?

A. I have been to the general location. In fact, I was there last week but I have never been to that crash.

Q. But you were there when it took place?

A. I think so. I didn't hear it hit if you want to know the truth.

(Testimony of Douglas Heay.)

Mr. McNabb: Your Honor, I will move to introduce this photograph into evidence at this time.

Mr. Boggess: I have no objection, your Honor.

The Court: May be admitted.

The Clerk: Plaintiffs' Exhibit "A."

(At this time, the photograph marked as Plaintiffs' Identification No. 1 was offered into evidence and marked as Plaintiffs' Exhibit "A.")

Q. (By Mr. McNabb): Now Mr. Heay, if that ink dot on the photograph [55] represents the approximate location of the crash, where is the saddle?

A. Right back over in here.

Q. Well now, as we view this photograph, which direction from the approximate location of the crash is that saddle?

A. It would be—this way is north. It would be just about west over there. This looks like it is running that way. It's coming down the lake actually and this hill looks higher because it is closer and I was back up in here flying southwesterly. In other words, by the time I got to the ridge, I would have had plenty of altitude. I made a 180 degrees—not quite a 180 degrees—I made my turn to get out of this draft which was evidently spilling down on the back side of this mountain and attempted to reach the lake again and dived at it in a diving attitude, nose low and full throttle, recovery altitude you might say and I couldn't reach it.

(Testimony of Douglas Heay.)

Q. Now, the saddle is to the left of this ink spot which represents the crash?

A. The left is—in that picture, yes.

Q. Now, how far to the left of that ink spot is the crash location, a mile or two miles?

A. Yes, it is that, I would think. The angle that this picture is taken (interrupted).

Q. Would you say it is two miles?

A. I couldn't swear. I can't tell from this. [56]

Q. Well now, looking at the map here from the spot on which you have designated the crash down to the saddle represents approximately one-half an inch.

A. That would be about 2 miles.

Q. Approximately 2 miles?

A. It would represent about 2 miles—five miles to the inch and a quarter.

Q. So you were not approaching that saddle straight on toward it. You were angling towards it?

A. That's right. I had gone up the lake and was coming back, angling back towards it and we started in here some place.

Q. Now then, how much elevation over the lake did you have when you left the boundary of the lake, left the water?

A. Starting back toward the ridge?

Q. Yes.

A. I figure pretty near a thousand feet.

Q. But you were still climbing?

A. That's right.

Q. How much elevation do you think is proper—a proper amount of elevation to safely cross that saddle or any hill as far as that's concerned?

(Testimony of Douglas Heay.)

A. Usually all you can get, but to safely cross it with shifting winds, you shouldn't have less than 500 feet I should imagine. [57]

Q. You say with shifting winds. Were the winds shifting up there?

A. I didn't know it at the time. They had just previously shifted before I took off.

Q. Would you say then with the knowledge that the wind had previously shifted that put you on notice for additional shifting winds aloft?

A. Not the way you have it worded, no. It didn't put me on, oh, on guard you might say because that wasn't an excessive wind for that country. In other words, it was normal flying for Paxson Lake, as far as I was concerned.

Q. What? You mean shifting winds are normal for Paxson? A. For what?

Q. For the Paxson vicinity, shifting winds are normal? A. Well, yes.

Q. You had approximately thousand feet of altitude as you left the lake and approached the hill?

A. Estimated.

Q. A thousand feet over the water that is?

A. That's right.

Q. And you were continuing to climb?

A. Yes.

Q. How were you continuing to climb, at full throttle? A. Yes, I was.

Q. But can you estimate the rate of climb of that airplane? [58]

A. The higher your altitude, the less your rate

(Testimony of Douglas Heay.)

of climb is going to be. It is pretty hard for me to estimate. I just know the attitude I was approaching to me was sufficient to clear going over with lots of clearance and as far as estimating how many feet per minute, I couldn't pin it down.

Q. You say that you—as you approached that hill, you struck a downdraft?

A. I found myself in one. I think it struck me first.

Q. The plane was in a downdraft?

A. The plane first started to settle for no reason in the world. In other words, my horizon was changing much to my sorrow so I realized I was in a downdraft so I made every attempt to get out of it.

Q. How close to that hill were you when you struck that downdraft?

A. I would say I was better than half way up to the saddle.

Q. Well I know, but I mean, you were flying at least partially parallel to the peak of the hill, weren't you? You were approaching it in a south-westerly direction.

A. At an angle, yes. I was over the hill or part of the hill. It was graduating.

Q. How far from that hill were you when you hit that downdraft?

A. You mean how far from the peak?

Q. No, from the hill. You were flying along in a general [59] direction slightly parallel to that hill.

(Testimony of Douglas Heay.)

How far from that hill were you when you hit the downdraft? A. I was over part of it.

Q. I know, but we are talking about altitude. How high over the ground were you when you hit the downdraft?

A. Well, I would say—oh, I don't know. That I can't say. I just don't (interrupted).

Q. Well, were you 300 feet?

A. Oh, I was better than 300 feet.

Q. Four hundred feet?

A. I would say 500 feet at least.

Q. Uh-huh. That is 500 feet altitude.

A. Flying into it at an angle.

Q. At that angle, how far were you from that hill as it sloped down underneath you there?

A. I would say 500 feet.

Q. Five hundred feet from the ground and 500 feet from the hill?

A. Oh, no. I was more than 500 feet out. I would say I was a thousand feet out.

Q. A thousand feet out and 500 feet from the ground?

A. Five hundred feet vertically and a thousand feet horizontally.

Mr. McNabb: That's all I want. Shall we take a recess for lunch?

The Court: Yes. [60]

(At 12:00 o'clock noon, the trial of this cause was recessed until 2:00 o'clock p.m.)

(At 2:00 o'clock p.m., the trial of this cause was resumed.)

The Court: Counsel ready to proceed with the trial of Phillips versus Heay?

Mr. McNabb: Plaintiffs are ready, your Honor.

Mr. Boggess: Defendant is ready, your Honor.

The Court: Very well. I think you're on the stand, Mr. Heay.

(Mr. Douglas Heay resumed the witness stand.)

Direct Examination

(Continued)

By Mr. McNabb:

Q. Now, I believe we have the position of the airplane, 500 feet above the ground and 1,000 feet from the hill at the time you hit the downdraft, is that correct? A. As close as I know.

Q. Now then, when you hit that downdraft, what happened to the airplane?

A. The airplane started to settle. I noticed from my horizon I was losing altitude while I was still in a climbing [61] attitude.

Q. Now in reference to the horizon, the airplane though losing altitude, was nose high, is that correct? A. It wasn't until I corrected it.

Q. The minute you hit the downdraft, the nose was high, is that right?

A. Yes, in a climbing attitude.

Q. Then you hit the downdraft? A. Yes.

Q. And the plane began to settle in that same position, is that correct? A. Yes.

(Testimony of Douglas Heay.)

Q. Now then, what did you do?

A. Well, I recovered, dropped the nose down and made my turn back towards the lake and kept the nose down attempting to gain air speed and gain control and get back to the lake.

Q. Now tell me, you say you recovered. What do you mean by the word "recovered"?

A. Well, recover from its attitude of settling or to keep it from stalling is what it amounts to.

Q. Well, what did you—you say you had recovered?

A. Well, evidently I didn't completely or I wouldn't have cracked up. I attempted to recover.

Q. You attempted to recover and in attempting to recover you made a turn? [62]

A. I lowered the nose and made a turn here and put the nose down at full throttle.

Q. Which direction did you turn?

A. I turned, I believe, it was to the left back towards the lake.

Q. And how much of a turn was that?

A. Oh, possibly 90—pretty near 90 degrees. I was heading toward the hill at a 45 degree angle. It would be say 70 or 80 degrees.

Q. Well now, would you look at the map? Is this your general line of flight as marked in blue pencil?

A. Yes, angling at—towards this saddle at approximately 45 degrees.

Q. Well now, we will assume that—(pause)—your Honor, for the purpose of determining as

(Testimony of Douglas Heay.)

accurately as possible the precise angle at which Mr. Heay approached this range of hills, I am going to draw on the map a straight line from the peak which is marked "X" to the peak which is marked double "X" in ink. Now, in blue—in reference to this line which is from peak to peak, the blue line indicating your flight represents the angle at which you were approaching the hill, is that correct?

A. That's correct.

Q. Then as it is shown here, it is approximately a 45 degree angle, is that correct? [63]

A. About that, yes.

Q. Now you hit the downdraft and you turned then and as it is indicated here Mr. Heay, that was for all practical purposes a 180 degree turn to the left.

A. That's the way I marked it.

Q. Is that true and correct as you recall it?

A. Well, I don't believe I turned quite that far. What I done here when I started, I was off and—I tried to adjust my first marking there.

Q. From the red pencil to the blue?

A. Yes, and then when I made my turn here in blue (interrupted).

Q. Do you want to readjust that further?

A. Well (interrupted).

Q. Perhaps you didn't get clear down here before you hit the ground?

A. How far up the mountain I had actually hit I don't know.

Q. You have shown here a 180 degree turn.

A. I don't believe it was that much. It's hard

(Testimony of Douglas Heay.)

telling. I turned so I was more or less (interrupted).

Q. Heading toward the lake?

A. Toward the lake.

Q. So then, we will assume you're back here then?

A. Approximately. I don't know for sure.

Q. Yeah. Well now, we will mark that "C" "2," how's that? [64]

A. Correction?

Q. Yeah. Is it then your opinion, Mr. Heay, that the circle marked here as "C 2" perhaps more clearly—more correctly indicates the position of the airplane where you struck the ground?

A. Yes, to my knowledge.

Q. Okay. Now, you attempted to recover. Initially you stated "I recovered" and turned and got the nose down. Now you think that you turned and got the nose of that plane down and attempted to recover.

A. That's right, only it was getting the nose down and then the turn.

Q. You didn't—you got the nose of the plane down before you made your turn, is that correct?

A. Yes.

Q. And you headed back (interrupted).

A. Towards the lake.

Q. Towards the lake. Now, did you cut the throttle?

A. No.

Q. Did you have full throttle?

A. Yes, I did.

(Testimony of Douglas Heay.)

Q. Now, at any time before you struck the ground, did you haul up on the stick?

A. No, I didn't haul up. I felt the stick or felt if there was any (interrupted). [65]

Q. Lift?

A. Any control, any control on the tail surfaces. You might call it lift. In other words, by going into that downdraft, I had lost my flying speed. The airplane had attempted to stall so I attempted to recover. In fact I did recover to a certain extent. I recovered enough that I could make a turn and yet not enough so you would recover fully. In other words, if I were in a stalling attitude and turned, I don't think I would have got as far down the mountain or as far as I did get. I would have spun in right there, to my knowledge or to my experience at any rate.

Q. Well now, did you have any control at all of that airplane after you made your turn?

A. Well, I made my turn and straightened out again.

Q. Did you attempt to get the nose up?

A. Just minor attempts, feeling it.

Q. And did the plane respond when you (interrupted). A. No.

Q. Well now, in these attempts that you made to regain control, what actually did you do? You say you felt it. What did you do? How do you feel it?

A. Well, the feel of the control stick in a ship—I don't know. The feeling is there, that's all. You

(Testimony of Douglas Heay.)

have enough force over your tail surfaces; there is so much tension there. [66]

Q. In what?

A. In your control—in your stick.

Q. How do you determine whether there is any tension in the stick or not?

A. Well, through experience.

Q. Well, is there any other (interrupted).

A. If it is soft, you don't have the (interrupted).

Q. Do you mean that you test whether there is any tension by pulling the stick towards you?

A. Well, yes, push or pull. You can feel it by a certain amount of stiffness or from the air flowing over your control surfaces.

Q. Now then, did you pull on that stick?

A. I pulled back to a certain degree. I am feeling to see if it has sufficient air speed to maintain control, find out if I had still the control or could get it, whatever was required.

Q. Did you feel any tension on that stick when you pulled back on it?

A. Not enough so that I could pull the nose out.

Q. Did you feel any tension on it?

A. Well, there is a certain amount there.

Q. Well, is that the normal tension that a man would feel if that—if he was sitting stationary on the ground?

A. If you're sitting stationary on the ground, it's just [67] sloppy in your hand. There is no tension there whatsoever.

(Testimony of Douglas Heay.)

Q. So it was something other than that type of tension?

A. It was beyond that. It was a little—it was stiffer than what it was or would have been if you were sitting on the ground.

Q. Did you at any time prior to the time that you actually struck the ground have the stick pulled back at all or more than normal? A. No.

Q. You didn't pull it out all the way like you were trying to climb (interrupted).

A. No. That's the last thing in the world you would ever do.

Q. That would have been the improper thing to have been done? A. Yes.

Q. Why would that have been improper?

A. You're just aggravating the stall.

Q. You mean that would have put you into the ground more rapidly?

A. Maybe not more rapidly, just spun in. I would have pulled up into a complete stall, lost all the air speed whatsoever and just come to a stop in the air.

Q. That would have happened if you hadn't had any power?

A. If I hadn't had any power? [68]

Q. Yes, if you hadn't had any power, you couldn't have got the nose (interrupted).

A. Oh, yes, you can do a power off stall. In fact that's part of your—power off and approach to stalls, that's part of your test for a private license.

Q. But at any rate, pulling that stick back as far as you could under the circumstances when you

(Testimony of Douglas Heay.)

were in a stall in a downdraft would have been the wrong thing to do, is that right?

A. That's right.

Q. And you didn't do it? A. No, I never.

Q. All right. Now, what part of that airplane hit the ground first?

A. That's a good question. I think it all hit it first as far as I know. First thing I know it was just straight and I got a windshield full of muskeg. That's all I saw.

Q. Would it be reasonable to assume that the nose hit first?

A. Well, from the looks of the airplane, the pictures I saw and what was described to me, the floats were curled back 180 degrees. My head was in the instrument panel. I was told by the C.A.A. inspector where we had hit a tree just a few feet of the ground and had slewed around a little bit.

Q. In what direction were you going when you—in reference [69] to the lake—when you hit the ground?

A. I was still heading back towards the lake as far as I know. They tell me the airplane was pointed partially around uphill again and which Joe Miraldi, he said it happened by hitting the tree just prior to contact with the ground and it had slewed the plane around uphill.

Q. Now Mr. Heay, I am sorry but I didn't understand your last answer. We were trying to get that man's name.

A. What was that last question?

(Testimony of Douglas Heay.)

Q. Do you have any independent recollection of which direction that plane was going when it struck the ground?

A. My last recollection was that I was still heading towards the lake and if I remember right, the way the hill sloped and then kind of shelved out, it would look to me like I was still heading for the lake and the last thing I know my windshield was full of muskeg and I never even heard the crash.

Q. Now Mr. Heay, what happens to an airplane when it hits a downdraft?

A. Well, if it's only a couple of hundred feet across and your doing 100 miles an hour possibly nothing much. It will get a little bumpy is about all; or if it is quite a great downdraft and you're heading into it in a climbing attitude, why with your nose high it will more or less start mushing on you, just getting soft. Your controls will get [70] soft.

Q. Do you mean by that that you lose control of the aircraft? A. You could.

Q. I don't understand.

A. You don't necessarily lose control. In other words, you're flying into a downdraft and the airplane could get mushy at the controls so (interrupted).

Q. There's the word I don't understand.

A. Well, it gets soft on the controls. I don't know how to describe it.

Q. Do you have control of the airplane if you—

(Testimony of Douglas Heay.)

if the controls get mushy? Do you have control of it?

A. Well, when they get mushy, it's an indication you're losing control.

Q. You don't have as much control as you had?

A. No.

Q. Your control has been decreased?

A. That's right.

Q. Well now, is there anything dangerous about a downdraft? A. Yes, there are.

Q. What is dangerous about it?

A. Loss of control of your airplane if you don't take proper measures. [71]

Q. Well now, what are the proper measures?

A. Usually to get the nose down; a nose down attitude and recover your air speed which you have lost in the downdraft. You're losing air speed—get that air speed back first thing, build it back up again.

Q. How do you go about getting your air speed built back up again?

A. Usually the first thing you do is lower your nose, give her full throttle, recover from that stalling attitude which a good sized downdraft could put you in.

Q. Now then, do you mean by that that you give it all the throttle that you can and fly it down into the same direction in which the downdraft is going or the wind is going?

A. If it is necessary—get down and pull out of the downdraft—get the nose down.

(Testimony of Douglas Heay.)

Q. Well then, if you recover your air speed and you can pull out, you think there is nothing dangerous about downdrafts?

A. That's a matter of opinion. I still think there is.

Q. Well, what is dangerous about it?

A. If you make your proper recovery and have room to do it in, there's nothing dangerous other than it could be an awful stress on your aircraft.

Q. What do you mean if you have enough room to do it in?

A. If you don't run out of air which I did. [72]

Q. You mean if you don't run into the ground?

A. That's right.

Q. Well then, what do you do to avoid getting into a place where you can't recover?

A. Well, there are minimum safe altitudes and it is up to you to judge what is the minimum safe altitude.

Q. You mean then it is just a matter of getting high enough so that if you run into one of these things that you can get your nose down and come out of it before you strike the ground?

A. Yes, but there are also sometimes circumstances beyond your control. In other words, you can—you never know when you're going to run into one as large as I did I don't believe. It is something out of the ordinary.

Q. Well, I am not saying that's not true. I am talking about down drafts in general. Now, you

(Testimony of Douglas Heay.)

say it is true that you can recover from a down draft if you have enough altitude, Mr. Heay?

A. Not always. That's been proven.

Q. Well now, what do you do to minimize the danger of striking the ground?

A. You've got me there. You maintain a certain altitude.

Q. It's just a matter of being high enough?

A. That's right.

Q. And the proposition is that if you had had maybe another [73] thousand feet here in this instance that you would have been able to recover this time?

A. That's possible. Of course, I don't know where that down draft is starting from. It might have been at the top of the mountain at 5800 feet and have been in the same circumstances. I dove for an awful long ways which quite a few people saw me. They had watched my take off and were standing at the Sportsman and they just said I was coming down and down and down. They expected me at any moment to flatten out and come out over the lake.

Q. And you were pulling—trying to test the controls all the time?

A. I was feeling it and she still wasn't ready to fly.

Q. But you had to do everything you could to pull it out, didn't you?

A. I had done it already. I was at full throttle, nose low attitude and just waiting for the airplane

(Testimony of Douglas Heay.)

to regain air speed, her flying speed. In that mass of air that I was inside of, it could not be done. Professor Ragle out here is (interrupted).

Q. Now I think Mr.—Professor Ragle will probably testify here.

Clerk of the Court: Defendant's identification number—plaintiffs' identifications number 2, 3, 4 and 5. [74]

(At this time, a photograph of an airplane was marked as Plaintiffs' Identification No. 2.)

(A photograph of an airplane was marked as Plaintiffs' Identification No. 3.)

(A photograph of an airplane was marked as Plaintiffs' Identification No. 4.)

(A photograph of an airplane was marked as Plaintiffs' Identification No. 5.)

Mr. Boggess: Your Honor, counsel for the defendant has seen these.

Clerk of the Court: And plaintiffs' identification number six.

(A photograph of an airplane was marked as Plaintiffs' Identification No. 6.)

Q. (By Mr. McNabb): Mr. Heay, I have handed you plaintiffs' identifications number 2 through 6 inclusive and ask you if you know what those represent?

A. A badly beat up aircraft.

(Testimony of Douglas Heay.)

Q. Any particular aircraft, Mr. Heay?

A. Well, it's the one that I rented from Dean Phillips, 803 Mike.

Q. M? A. M.

Q. Do those photographs truly represent the condition of [75] that aircraft after the accident which occurred at Paxson Lake on the 20th day of September, 1950?

A. I don't know. Jess Bachner pulled me out of the airplane and headed me down the mountain. That's all I know.

Q. Do you know that those are pictures of that particular airplane?

A. Well, from the description I have been given, they are.

Q. Is there anything about those pictures with which you can identify them with the airplane which you were flying on the 20th day of September?

A. Yes, the picture of the lake here in the background. It's evidently where the wing tip dug in. I didn't know the N C number of the aircraft. That's why I say (interrupted).

Q. You didn't know it? A. No.

Q. What did you just call that number from then?

A. From the photograph on the tail surface.

Q. Does that appear to be the same airplane?

A. Yes, it does from the description I have.

Q. Well, you testified that the floats had been

(Testimony of Douglas Heay.)

turned back at 180 degree angle and the motor here is turned up at a 45 degree angle.

A. As I had been told.

Q. So, you don't know whether this is the same airplane or not then? [76]

A. No, I don't. I couldn't swear. Could you? I was out when—after I hit.

Q. Now Mr. Heay, you say you made a complete circle of that lake?

A. No, not a complete circle of the lake. That lake is 12 miles long.

Q. Well, I don't mean—you turned 360 degrees?

A. Yes.

Q. And you were climbing all that time?

A. I was in a climbing attitude, yes. I was climbing.

Q. And you were climbing at about 70 miles an hour?

A. I would say so, yes. I know one time I was doing 70 indicated. I was doing over 70. You add 2 feet per thousand feet and the elevation of that lake is 2500 feet to start with.

Q. Now then—but you do not know how many feet per minute you were climbing?

A. No, I don't. When I made the turn south, I was going down wind again and I don't believe I was climbing quite as fast as I was when I was going north. I was going faster—my ground speed had increased.

Q. Now, during that 360 degree turn which you

(Testimony of Douglas Heay.)

made over the lake, did you notice any turbulence there? A. Not that I remember.

Q. Well, as you crossed the northern end of the lake—I believe you testified you got or flew a little north of the [77] lake? A. Yes.

Q. Did you feel any turbulence at all up there?

A. Not that I remember.

Q. Do you remember (interrupted.)

A. At least not enough that it would cause any alarm.

Q. Did you feel any turbulence as you approached the hills? A. I don't believe so.

Q. Did you know that there was any wind blowing?

A. Yes, I knew there was wind blowing.

Q. Well now, when you were going down wind south, did you feel any turbulence then?

A. Not that I remember. I probably noticed just a slight increase in the ground speed but that was about all.

Q. But you did notice an increase in the ground speed?

A. I possibly did. It didn't register. I mean, it was something that was normal when you turn down wind. You're bound to get an increase.

Q. Mr. Heay, after you got that airplane airborne, did you feel any bumps at all?

A. Turbulence?

Q. Well now, that's the point. We don't know what your definition of turbulence is. Was it bumpy any? A. Not that I recall.

(Testimony of Douglas Heay.)

Mr. McNabb: Your Honor, at this [78] time, we would like to excuse this witness with the—reserving the right to recall him.

The Court: Very well.

(At this time, Mr. Douglas Heay was excused from the witness stand.)

Mr. Parrish: Your Honor, Mr. McNabb has to go to the Commissioner's Court for just a few minutes. We have—another reason we asked for—to withdraw Mr. Heay was so that we have a witness that is due back at 26 Mile this evening and I want to call Mr. Phillips for a few moments until Mr. McNabb gets back and then if possible we would like to call that witness at 26 Mile.

The Court: Very well.

DEAN PHILLIPS

called as a witness in his own behalf, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Parrish:

Q. State your name, please?

A. Dean Phillips.

Q. Are you one of the plaintiffs in this action?

A. I am.

Q. Where do you live?

A. King Salmon, Alaska. [79]

Q. On the 20th day—on or about the 20th day of September, 1950, where did you reside?

(Testimony of Dean Phillips.)

A. Fairbanks, Alaska.

Q. Are you one of the owners—were you at that time one of the owners of a Piper Super Cruiser aircraft?

A. I was.

Q. 115 horse power engine?

A. I was.

Q. Now, about the 20th of September, 1950, did you have any dealings with Mr. Douglas Heay, the defendant in this action, concerning this airplane?

A. I did.

Q. Will you just tell the court—did you have any conversation with him?

A. Yes, I did.

Q. Will you tell the court what they were?

Mr. Boggess: Just a moment, your Honor, unless it is established when, where and who was present during these conversations.

Q. (By Mr. Parrish): When did you have these conversations?

A. I had the first one in the morning.

Q. And where was that?

A. At Week's Tower.

Q. Who was present? [80]

A. I believe Walt Bear and Jim Freericks.

Q. And what did you say and what did Mr. Heay say?

A. Mr. Heay requested to rent our Super Cruiser for the purpose of going up to Tangle Lakes to recover a Cessna 170 that he had had an accident with that week and we told him—correction—I told him we didn't rent it and if he couldn't possibly find any other aircraft that he could rent or borrow,

(Testimony of Dean Phillips.)

that we would see if we couldn't work something out on the Super Cruiser.

Q. Was that the extent of the conversation at that time, Mr. Phillips?

A. Approximately, yes.

Q. When did you have the next conversation with him, if any?

A. It was still that morning as I recall at Week's Tower under the same circumstances and he said he couldn't find any other aircraft and that he needed to get up there very badly in order to get the airplane out before it froze in the lake and he had wanted to use the Super Cruiser. I told him that we didn't rent it; that I would let him use it. He bought his own gas and oil of course and I told him I would check him out and I would meet him downtown later that afternoon after dinner.

Q. And was there any conversation at any time concerning the condition of the airplane? [81]

A. Yes. I told him while I was checking him out or before I checked him out (interrupted.)

Q. Who was present?

A. I don't believe anybody but Mr. Heay and myself. It was I believe out in front of the Northern Tap. I don't remember the exact location. I just told him that we had just had the engine overhauled and it had less than a hundred hours on it so he would know that he didn't have to treat the engine with any out of the ordinary care because he would know that we had it worked on and just took him down to the airplane to see that he

(Testimony of Dean Phillips.)

could handle it correctly because he hadn't flown that particular type of aircraft for some time he said and I just asked him how many days he would be gone and he said approximately three days and I just requested he bring it back in one piece and he said he would, and that's just about all. Except he said that Mr.—I forget his name—the man at Arctic Pacific, the fellow who was with him out at the lake—was going up with him.

Q. Was there any conversations about him taking a mechanic or anything of that nature?

A. He said that this fellow that was going with him was going to see if he could get the airplane to work on it.

Q. Who was that, do you know?

A. I know him but I can't think of his name at present. Ernie Hubbard. It was Ernie [82] Hubbard.

Q. And when did you first find out about—let me ask you this. Did he take the airplane?

A. Yes, he did.

Q. And when did you first find out that the airplane had been destroyed?

A. I believe it was the next day. It was after four o'clock. I got off watch at four o'clock and I was home at the time and Jim Freericks came over to the house—to my house—and told me that Doug Heay had stacked up the airplane.

Q. Who is Jim Freericks?

A. He's the fellow that works at the tower with me.

(Testimony of Dean Phillips.)

Q. And what did you do then?

A. Well, I—first I thought he was joking and pretty quick he convinced me it was the truth so I went over to Mr. Heay's house to see him and I can't remember if I rode with Freericks or whether I went in my own truck. I think I went in my own truck and we went in the house approximately the same time.

Q. Who was at the house?

A. Mrs. Heay and Doug Heay and Jim Free-ricks and myself.

Q. Was there anybody else there?

A. Not that I recall.

Q. Did any conversation concerning the airplane take place at that time?

A. Yes, it did. [83]

Q. Between you and Mr. Heay?

A. Yes.

Q. What did you say and what did he say?

A. I asked him what had happened and he told me approximately the same words he described the accident here and he said he was very sorry it happened. Of course I said I was too. He said that he would either replace the airplane or before that, he said that—he asked me what I thought the air-plane was worth and I told him \$3,000 and I told him the reasons I thought it was worth \$3,000 and he agreed to it.

Q. What were those reasons?

A. Well, the price—original price of the air-plane plus the (interrupted).

Q. What was the original price if you remember?

(Testimony of Dean Phillips.)

A. We paid \$2,000, the initial cost of the airplane.

Q. And what made it worth \$3,000 then?

A. We paid \$1200 for a pair of Edo floats for it and we had bought a \$300 Sensich 2 position prop which cost approximately \$300 and we had (interrupted).

Q. Is that a nominal (interrupted).

A. That was a new prop. That was the standard price for it.

Q. Was that in addition to the regular prop?

A. Yes, it was.

Q. Okay. [84]

A. We had sold the original prop after we bought the Sensich.

Q. Do you remember what you got for the original prop? A. \$30.

Q. How much again did you pay for the new prop?

A. Approximately three hundred. It was over three hundred.

Q. What other (interrupted).

A. We bought a pair of skis from United Air Motive in Anchorage for approximately \$225 and had the landing gear beefed which was compulsory in order to have the skis put on the aircraft and then we had our engine which was formerly a 100 horse, we had that converted to 115 horse power and at the same time we had the aircraft engine majored.

Q. Not including the major overhaul, what would

(Testimony of Dean Phillips.)

be the cost of converting the engine to 115 horse?

A. Without labor, I believe it's right around \$100.

Q. And with the labor how much is it?

A. Well, it takes a complete tear down of the engine which consists of a major overhaul.

Q. What I am trying to get at is to convert the extra 15 horse, how much money to have that portion of the reconditioning (interrupted).

A. I would estimate with the labor about \$300 not counting the parts for the major overhaul such as bearings and rings and so on. [85]

Q. The major overhaul would do nothing more than bring the airplane up to what condition?

A. Excellent condition I would say—near new—as near new as it could be without being new.

Q. How do you define a major overhaul if you know?

A. That is a complete tear down of the engine, replacement of all bearings and rings if they need it, rods and everything that is rebuilding.

Q. It adds to rebuilding the engine?

A. That's right.

Q. Now, is there any inspection of those engines after a major?

A. Well, the mechanic that majors them inspects them. He is authorized to do that.

Q. By whom is he authorized?

A. Civil Air Administration.

Q. And had this plane been inspected after its major?

A. It had.

(Testimony of Dean Phillips.)

Q. And what condition then do you think the engine was in after the major overhaul?

A. Excellent condition and that was the opinion of the mechanic that overhauled it.

Q. Had you flown the aircraft?

A. Yes, I had.

Q. And did you have any conversation with Mr. Heay about [86] the aircraft engine and its condition?

A. Yes, I did.

Q. When did that take place?

A. At the—well the conversation before he asked to use the airplane and also at the time he asked to use it.

Q. Did he have an opportunity to fly the engine before he took it?

A. Yes, I checked him out. I went up with him for approximately half an hour.

Q. Going back over your list to make sure on it, the original price of the airplane was \$2,000?

A. That's correct.

Q. \$1200 for the floats? A. That's correct.

Q. And what condition were they in?

A. Very good condition.

Q. How old were they?

A. As far as I know they were about a year or a year and a half old.

Q. And how much had they been used?

A. One summer.

Q. About how many months?

A. Approximately 3 I would say.

(Testimony of Dean Phillips.)

Q. Is there any definite life to floats that you know of?

A. No. As long as they are taken care of, they are good [87] indefinitely.

Q. I believe you stated \$300 for a propeller?

A. That's right.

Q. Additional propeller.

A. That's right.

Q. And \$225 for skis? A. That's right.

Q. What else?

A. \$60 for the beefing of the gear.

Q. What is beefing of the gear.

A. That's—on this particular model aircraft, they had reinforcements to go on the landing gear in order to hold the shock of landing on the skis.

Q. \$300 for the conversion and the major overhaul?

A. No. The major overhaul and the conversion bills on that was around \$600. It was pretty close to that.

Q. \$300 of it was just conversion?

A. Yes, that's about what it would run for the conversion without the parts for the major. Now, that's my estimate on it.

Q. That would total \$4,085 and your salvage out of the old prop was about how much?

A. \$30 we got when we sold it.

Q. So in the airplane you figured you had \$4,055 approximately? [88]

A. That would have been the approximate expenditures for the equipment listed.

(Testimony of Dean Phillips.)

Q. Now, how long had you had the airplane?

A. We bought it in May, of '48. We had it approximately a year and a half altogether.

Q. Was it new when you bought it?

A. No, it wasn't.

Q. Can you state the condition of the airplane?

A. When we bought it? It had approximately 280 hours on it and it was in very good condition.

Q. And what—in what condition was it when you loaned it to Mr. Heay?

A. I would say with the engine and the floats and the whole works, I would say good condition.

Q. Was this plane certificated in any way by the Civil Aeronautics or C. A. B.?

A. Yes, it was by the Civil Aeronautics.

Q. And how long since its last inspection?

A. It had been inspected last at a 100 hours previously and it had been worked on by a mechanic within thirty or forty hours of that time.

Q. How much of this to your recollection did you discuss with Mr. Heay at his house that evening?

A. Oh, I think it was just gone over very lightly.

Q. And what did he say when you estimated the value at [89] \$3,000.00?

A. He said he thought that was fair enough or words to that effect.

Q. Now, did he make any other conversation—did he say anything else about paying for the airplane at that time? A. No, he didn't.

(Testimony of Dean Phillips.)

Q. Well now, I will ask you, was there any conversation concerning replacing the airplane at that time?

A. I don't believe there was at that particular time. Mr. Heay was kind of feeling kind of bad that day so we didn't carry on a lengthy conversation.

Q. When was the last time you had any conversation with Mr. Heay concerning the airplane?

A. I believe it was after the engine was brought down from the lake.

Q. About when was that?

A. Well, it was approximately a week later. I don't remember exactly the number of days.

Q. Under what circumstances did that conversation take place?

A. It was in Mr. Heay's home.

Q. Who was present at that time?

A. I believe just Mr. Heay and myself were present.

Q. Was Mrs. Heay there?

A. Not that I recall. [90]

Q. What was said at that time?

A. Mr. Heay told me about them bringing the engine down and that they were going to open it up and see if it was damaged internally. It looked all right from the outside and I said it shouldn't—he should be able to sell the engine for a price and that would make the bill a lot less for him.

Q. What did he say?

(Testimony of Dean Phillips.)

A. He said "Yes, that's right" or words to that effect. I don't remember exactly.

Q. When was the—let me ask you. Did he say who brought the engine down?

A. Yes, he did.

Q. And who was that?

A. Jim Freericks and Louie Frank.

Q. Is Louie Frank here?

A. I believe he is outside at present.

Q. And is Jim Freericks here?

A. Yes, he is.

Q. Did you have any further conversation about the engine then? A. Yes, at a later time.

Q. About when?

A. Oh, it was probably three or four weeks later. I am not sure exactly. [91]

Q. Where did it take place?

A. I believe that took place in the Northern Tap Room.

Q. And what was said then?

A. He told me that Louie Frank had taken the engine down and had measured it and it was all right internally. The engine wasn't damaged.

Q. Did you have any conversation with Mr. Heay at that time about the skis?

A. Yes. He told me (interrupted).

Mr. Boggess: Let's establish the time.

The Witness: I believe it was the first part of November sometime.

Q. (By Mr. Parrish): Where did it take place?

(Testimony of Dean Phillips.)

A. I believe it was in the Northern Tap Room. I am not sure.

Q. Who was present then?

A. Just Mr. Heay and myself I believe. I don't think anybody else was listening in.

Q. What was said at that time?

A. He asked me about the skis, what condition they were and where they were and I told him that they were in very good condition. I told him that they were in my basement yet and he said that he was going—he thought he would try to sell [92] them or words to that effect.

Q. Do you know if he made any arrangements to sell them? A. Yes, I do.

Q. Well now, will you state how you know that?

A. Mr. James came to my house one evening in November sometime and asked if there was a pair of skis at the house that belonged to Mr. Heay. I said there was. He said that he was dicker-ing to buy them and that he would like to look at them.

Q. Did you make any—have any conversation about selling the skis with this man?

A. I took him down in the basement and showed him the skis and he left and oh, approximately probably three hours or so, he came back to the house and showed me a receipt signed by Doug Heay.

Q. Do you know Mr. Heay's signature do you think?

(Testimony of Dean Phillips.)

A. I'm no handwriting expert but I have seen his signature on a couple of checks and I think I would recognize it.

Q. Let me ask you this. Did you have any conversation with Mr. Heay about his having sold the skis? A. After, yes.

Q. When was that?

A. Oh, I don't know. It was probably a few days later when I met him either at the Northern Tap or on the street.

Q. What was said then? [93]

A. I told him that I thought he had given the fellow that bought the skis a real good buy and he said that well, he hadn't seen them and he didn't know what they were worth so he just sold them for \$150.

Q. Did he make any acknowledgment at that time that he had sold the skis?

A. Yes, he had sold them for \$150.

Q. To whom?

A. Floyd James I believe his name is.

Q. Did you at any time ever ask anybody to go get the engine? A. No.

Q. Did you ask Mr. Heay to go get the engine for you? A. No.

(At this time, Mr. Parrish handed a document to Mr. Boggess.)

Mr. Parrish: I ask that this be marked for identification.

Clerk of the Court: Plaintiff's identification number 7.

(Testimony of Dean Phillips.)

(At this time, a receipt dated 10/25/50 was received and marked as Plaintiffs' Identification No. 7.)

Q. (By Mr. Parrish): I hand you this paper and ask you if you know what it [94] is?

A. Yes.

Q. Will you state what it is?

A. It is the receipt that Mr. James showed me when he came over to get the skis.

Q. And by virtue of this receipt, you gave him the skis, is that right? A. I did.

Q. And do you recognize the signature?

A. Yes, as far as I am able to, yes.

Q. You believe that is Mr. Heay's signature?

A. I do.

Mr. Parrish: We offer it in evidence, your Honor.

Mr. Boggess: No objection, your Honor.

The Court: May be admitted.

Clerk of the Court: Plaintiffs' Exhibit "B."

(At this time, Plaintiffs' Identification No. 7 was offered in evidence and received and marked as Plaintiffs' Exhibit "B.")

The Court: We will take a 10 minute recess.

(At this time, a short recess was [95] taken and thereafter the trial of this cause was resumed.)

The Court: Counsel ready to proceed with the trial?

(Testimony of Dean Phillips.)

Mr. Parrish: Ready, your Honor.

Mr. Boggess: Ready, your Honor.

(Mr. Dean Phillips resumed the witness stand.)

Direct Examination

(Continued)

By Mr. Parrish:

Q. Just to clarify the record, who are the owners of this aircraft in question here?

A. Myself, James Kelly and Charles Gray.

Q. Were you all equal owners?

A. We were.

Q. Now, concerning the engine again, did you ever have any conversation with Mr. Heay as to whether he sold the engine or not?

A. Yes, I did.

Q. When was that, where was it, and who was present?

A. It was at the Northern Tap and nobody but myself was present and Mr. Heay. I don't know exactly when. It was in January sometime as I remember, first part of January or the last part of December.

Q. What was said at that time?

A. I went in there and—to find out about getting some [96] more money. I told him that we needed it very badly and we were willing to take the salvage at a fair price and I had an itemized list of the parts that were left and a fair price

(Testimony of Dean Phillips.)

on them which I got by going out to the field and (interrupted).

Q. Did you take the salvage?

A. No, I did not.

Q. The engine now, did you sell it?

A. I did not.

Q. Do you know if it was sold?

A. I just heard that it was sold. Louie Frank called me up sometime in the last part of December or first part of January. I don't exactly remember when.

Q. Did Mr. Heay ever tell you that he sold it to Mr. Frank? A. Yes, he did.

Q. When did he do that?

A. At the Northern Tap he told me that at the time we were having the conversation on these parts.

Q. Now what was said?

A. He said that—I told him that the prices we had given him—when it came to the engine, I told him \$400 because Mr. Frank had told me that he was in the process of buying it from Mr. Heay and Mr. Heay told me that he didn't want to sell it to us for \$400 since Louie Frank was going to give him \$450 for it. [97]

Q. As near as you know then, it would still be in Mr. Heay's possession or he would have sold it to Mr. Frank? A. As far as I know.

Q. Did you ever bring any of the salvage down from the wreck? A. No, I did not.

(Testimony of Dean Phillips.)

Q. Do you know who brought it down if any-one, of your own knowledge, do you know?

A. I have never saw anybody been—bring any down.

Q. Now, have you received any money on the purchase price of the airplane?

A. Yes, I have.

Q. How much have you received?

A. A total of \$650.

Q. From whom did you receive that?

A. Mr. Heay.

Q. Has any more been paid?

A. No, it has not.

Q. Have you ever had any conversation with Mr. Heay about paying any more?

A. Yes, I have.

Q. When was that?

A. Well, I had one every week for a while.

Q. Where was it?

A. Most of them over the telephone. [98]

Q. Now, what was—can you place any particular conversation?

A. Well, I remember the conversation, but I don't remember the exact date.

Q. What was said? What was the substance of these conversations if you remember?

A. I asked him if he could help us out some on the money he owed us on the airplane and he said well, at present he couldn't but he would have some money for us the following Monday.

Q. Did he ever pay you then any more?

(Testimony of Dean Phillips.)

A. No, he did not.

Q. Did he ever deny that he owed you the money? A. He didn't.

Q. You are positive that you never received any money from any buyers of the salvage?

A. That's right; except for a landing gear that Jess Bachner sold and I turned that over to Mr. McNabb.

Q. How much was that?

A. That was \$35.

Q. Did Mr. Heay know about that?

A. I don't know if he did or not. I mentioned to Mr. Heay at one time that Mr. Bachner's got a chance to sell the parts and he said he would and Mr. Heay said that was okay because you can't use the parts yourself and it's just if [99] somebody happens to come along and need a part and he was in a position to know if any such thing came up.

Q. Other than that, have you ever taken possession of any parts or the airplane from the scene of the crash? A. No, I have not.

Q. And Mr. Heay has never denied having taken over the airplane?

A. Not to me, he hasn't.

Q. And he has agreed to pay you the \$3,000?

Mr. Boggess: Just a moment. That calls for a conclusion of the witness. There has been no prior testimony that he agreed to do anything and the question is also leading, your Honor.

Q. (By Mr. Parrish): Well, did you testify

(Testimony of Dean Phillips.)

that you had any conversations with Mr. Heay about the salvage on the aircraft?

Mr. Boggess: The record will show what he testified to. I object.

The Court: You're just refreshing your memory? You want him to tell you what he has already told?

Mr. Parrish: Yes, that's all I was doing. I'll just let it go, your Honor.

The Court: All right.

Mr. Parrish: I believe he testified [100] to it anyway.

Q. (By Mr. Parrish): Did he tell you he would pay you \$3,000 at any time, Mr. Phillips?

Mr. Boggess: I will object to that, your Honor.

Mr. Parrish: Well, I asked if he told him that.

The Court: Objection overruled.

The Witness: He did.

Q. (By Mr. Parrish): And when was that?

A. He told me that the first time I saw him after the accident.

Q. And on the telephone, did he ever make any statements relative to when he would pay you?

A. Yes, he did.

Q. And when did he say he would pay you?

A. He told me it would be the week from the time we had the conversation, the following Monday.

Q. Did he ever pay you?

A. No, he did not.

Q. Were the skis on or about the airplane at the time Mr. Heay took it?

(Testimony of Dean Phillips.)

A. What do you mean? [101]

Q. Were the skis on the airplane at the time Mr. Heay took it? A. No, they were not.

Q. Where were the skis?

A. The skis were in my basement, stored.

Q. And did you deliver the skis to anyone?

A. I did.

Q. And who was that? A. To Mr. James.

Q. When was this \$650 paid?

A. I don't remember the exact dates. He paid \$400 approximately two—three weeks after the accident and then another \$250 between two and four weeks after that. I am not positive on the dates, but it wasn't too long after the accident.

Q. Do you recall whether the \$650 was paid before or after your conversations about the engine?

A. The money was paid after the conversations about the engine. He told me that somebody had gone up and gotten the engine.

Q. Did you ever have any conversations with Mr. Heay about where he would get the money to pay for the plane? A. No, I did not.

Q. Do you have an opinion as to the reasonable value of the plane at the time of the accident? [102]

A. I do.

Q. What is that?

A. I believe it was worth \$3,000.00.

Q. And what do you take into consideration in arriving at that?

A. The price of the aircraft at the time, the condition of this particular aircraft (interrupted).

(Testimony of Dean Phillips.)

Q. The number of hours on it?

A. That's right. That includes it.

Q. The age of it? A. That's right.

Q. And I believe you testified that those—that you had a conversation with Mr. Heay about that?

A. That's right.

Q. Was there any conversation with Mr. Heay as to when he would pay the \$3,000.00 at the time that the \$3,000.00 was discussed?

A. The first time the day after the accident, there was not.

Q. Was there any at any further time?

A. Yes. I asked Mr. Heay (interrupted).

Q. When was it?

A. It was approximately a week or 2 weeks after the accident when—I am not sure of the time.

Q. Where was it? [103]

A. I believe it was in Mr. Heay's home.

Q. Who was present?

A. Nobody but myself and Mr. Heay as far as I can remember.

Q. What did he say at that time concerning when he would pay the \$3,000.00?

A. I asked him—I told Mr. Heay he owed \$800 on the airplane yet. That was on the overhaul and also on the floats and that we would like to get that paid off as soon as possible and I asked him if he wouldn't give us the \$800 right away and if he would do that, we would let the rest of it go until he was back on his feet as he was in debt at the

(Testimony of Dean Phillips.)

time and he could get things straightened up and he agreed to it.

Mr. Parrish: No further questions.

Cross-Examination

By Mr. Boggess:

Q. Where did the first conversation relevant to this aircraft occur? A. At Week's Tower.

Q. Who was present?

A. Mr. Heay, myself and I believe Jim Freericks and Walt Bear. I am not sure about the latter two.

Q. At that time, did anything arise in your conversation with Mr. Heay about what Mr. Heay would pay you for the use [104] of that aircraft?

A. Yes, it did.

Q. Was Mr. Heay to pay for the use of the aircraft?

A. Mr. Heay was to pay me nothing for the use of the aircraft.

Q. Were you to receive any consideration from Mr. Heay for the use of the aircraft?

A. I was not.

Q. Did you or any of your partners require the use of an aircraft on the particular day that Mr. Heay contemplated using it?

A. We didn't require it. We were going to use it.

Q. Did you use an aircraft that day?

A. One of the partners did use an aircraft that day.

(Testimony of Dean Phillips.)

Q. Did—was the partnership billed for the use of that aircraft on that particular day?

A. I think Mr. Heay was billed for that, although I paid it.

Q. Why was Hr. Heay billed for that? Was that according to some prior understanding reached at Week's Tower?

A. Mr. Heay had agreed to pay rent on an aircraft to go down and get some moose meat while he was using ours. Otherwise (interrupted).

Q. There was some consideration for lending your aircraft to Mr. Heay, isn't that correct? [105]

A. No, there was not. He never paid it. I paid the bill.

Q. But there was an agreement that he compensate you at that time for paying for the use of the other aircraft?

A. I don't know that it was compensation, no.

Q. You were going to receive some value then, were you not, Mr. Phillips? A. I didn't.

Q. But you intended to receive some value, did you not?

A. No, I wouldn't say that it was value received.

Q. How—did you say that Mr. Heay was billed for the rental of that other aircraft?

A. That's right.

Q. Who gave him the bill?

A. I don't recall who gave him the bill. I suppose one was mailed to him. It was given to me.

Q. And after it was given to you, what did you do with it?

(Testimony of Dean Phillips.)

A. I gave it to Jim Freericks to give to Mr. Heay.

Q. And that is a bill that Mr. Heay would have, isn't it?

A. I don't know if he has it or not.

Mr. Boggess: Would you mark that for identification?

Clerk of the Court: Defendant's identification "A."

(At this time, an invoice dated 9/24/50 addressed to Dean Phillips was introduced and marked [106] Defendant's Identification "A.")

(Defendant's Identification "A" was shown to Mr. Parrish.)

Q. (By Mr. Boggess): Mr. Phillips, I hand you Defendant's Identification "A" and ask you whether you can identify that?

A. It's a bill made out to me for \$114 for the use of a float ship.

Q. Have you ever seen it before?

A. I don't know if I have seen this exact one. I seen one like it.

Q. What did you do with the one like it?

A. I gave it to Mr. Freericks to give to Mr. Heay.

Q. That's all. What is your occupation?

A. I am an airport traffic controller.

Mr. Parrish: That wasn't offered, was it?

Mr. Boggess: What?

Mr. Parrish: This bill.

(Testimony of Dean Phillips.)

Mr. Boggess: No, I didn't offer it.

Q. (By Mr. Boggess): What did you say your occupation is?

A. I am an airport traffic controller.

Q. And where are you employed?

A. For the Civil Aeronautics Administration at King Salmon, [107] Alaska.

Q. Are you employed at Naknek?

A. That used to be Naknek. It's now King Salmon.

Q. How long have you been employed down there?

A. I am down there approximately 2 months.

Q. And are you in charge down there?

A. I am.

Q. And do you have anyone down there that replaces you when you're absent?

Mr. Parrish: We object, incompetent, irrelevant, immaterial.

The Court: Objection sustained.

Q. (By Mr. Boggess): When did the second conversation—where did the first conversation occur after the accident with the defendant, Mr. Phillips?

A. At his home.

Q. And when was that?

A. That was the evening of the accident I believe. It was the first evening Mr. Heay was home after the accident.

Q. That would be the evening of the accident, you believe?

A. If he came home that day, yes.

(Testimony of Dean Phillips.)

Q. Had anyone advised you prior to going to see Mr. Heay that day that he wasn't in very good shape and probably not able to converse with [108] you?

A. Well, they said he wasn't in very good shape.

Q. Did anyone advise you not to go see him?

A. Nobody advised me not to go see him.

Q. Did Jim Freericks advise you not to go see him?
A. No, he did not.

Q. Do you recall Jim having been present—Jim Freericks having been present at that conversation?

A. I do.

Q. Now, you stated that it was during this conversation, this first conversation that Doug Heay agreed to pay you the sum of \$3,000, is that correct?

A. That's correct.

Q. State to the best of your recollection what his exact words were with reference to the payment of \$3,000?

A. I can't recall exactly the words, but he asked me what the—he said he was sorry about the airplane being smashed and he said that he would replace it or by it or words to that effect, and he said—asked me what I thought the airplane was worth and I told him \$3,000 and I asked him if he thought that was fair and he said "Yes," or words to that effect.

Q. At that time, you have just testified, that Mr. Heay offered to replace your aircraft?

A. Or (interrupted).

(Testimony of Dean Phillips.)

Q. Or buy it. Did he make any offer to replace your [109] aircraft at that time?

A. I don't believe he did at that time with any specific airplane.

Q. Do you recall whether or not he specifically made an offer to replace your damaged aircraft with an aircraft belonging to Hugh House?

A. I do.

Q. Did you know what type of aircraft Hugh House owned? A. I did.

Q. What type of aircraft did he own?

A. He owned a Super Cruiser.

Q. Do you recall now that Mr. Heay offered to replace your aircraft with House's Super Cruiser?

A. I do.

Q. And what was your reaction to that?

A. I told him no, we didn't want that aircraft; we wanted one in as good a shape as ours and in my estimation it wasn't in as good shape as ours.

Q. Just exactly what was wrong with House's aircraft? Why wasn't it in as good shape as your aircraft?

Mr. Parrish: We object to that as being incompetent, irrelevant and immaterial and the reasons why this party would not accept that aircraft would not tend to prove or disprove any of the issues in this case.

The Court: Objection sustained. [110]

Mr. Boggess: If the Court please, I would like to make the following offer.

The Court: Very well.

Mr. Boggess: The relevancy of this line of testi-

(Testimony of Dean Phillips.)

mony is that if Doug Heay offered to replace this plaintiff's aircraft with an aircraft in as good a condition and the defendant contends that he did, that Doug had promised to replace his aircraft or would if he could obtain a replacement and would replace it, that would be some evidence that the demand of the plaintiffs now is excessive because perhaps Mr. Heay could obtain—could have obtained a comparable aircraft for \$2,000.00 or \$2,500.00 or much less than the plaintiffs demand in this case.

The Court: Offer denied.

Q. (By Mr. Boggess): Now, in your complaint, Mr. Phillips, you have caused your attorneys to allege that at the time you loaned this aircraft to Mr. Heay, that Mr. Heay agreed to pay the costs of repairing it if it were damaged and agreed to pay its reasonable value if it were destroyed. Now, in direct examination, you have not testified to anything more than you admonished Mr. Heay to bring it back in one piece. Now, do you recall Mr. Heay having made any specific promises to repair that aircraft if it were damaged and replace or pay you the reasonable value of that aircraft if it were [111] destroyed, Mr. Phillips?

A. He told me he would bring it back in one piece.

Q. Is that all he said relevant to that particular subject, just that he would bring it back in one piece? A. That's all I can recall at present.

Q. Now, at the first conversation you had at Mr.

(Testimony of Dean Phillips.)

Heay's home, was the subject of salvage ever mentioned?

A. I don't remember if anything was said about salvage. I told him that it looked to me like the whole thing was a complete washout as far as the airplane goes, and I didn't know anything about the condition so I didn't know if there was any salvage or not.

Q. When you set the price of \$3,000.00 as you have stated you set it, were you making any allowance for salvage whatsoever?

A. No, I didn't want the salvage.

Q. Well, in figuring the price of \$3,000, did you take into account the salvage?

A. When I figured the price of \$3,000.00, I figured the price of the airplane complete and whatever there was that went with it.

Q. That would include the salvage then, would it not?

A. If there was salvage, I suppose it would, yes.

Q. How could you set the reasonable value of the aircraft at \$3,000.00 if you didn't know the condition of the engine [112] that was still up at Paxson Lake?

A. He wasn't buying the airplane in useable shape.

Q. In your conception, this is a contract to purchase a demolished aircraft, is that correct?

A. That's right.

Q. And nothing more or less?

A. That's right.

(Testimony of Dean Phillips.)

Q. Now, you have testified—correct me if I am wrong—that \$300.00 would be the approximate cost of conversion, that is, converting the engine to a higher aircraft—to a higher horse power engine?

A. That's right.

Q. How did you arrive at the figure of \$300.00? Was that actually charged to you?

A. Yes, the bill was sent to me. The full bill was more than three hundred. I am not counting the parts for the major overhaul. The way I arrived at that figure, I know the kits for converting a 100 horse power engine to 115 horse power engine is approximately \$100.00 and the labor on it would be about twice what the kit is. That's what I was told by a mechanic.

Q. You did your own labor then? A. No.

Q. Who paid for the labor?

A. We did. [113]

Q. And how much did you pay?

A. The full bill came to just a little under \$600.00 as I recall. I don't recall the exact amount of the bill but that was for a complete overhaul and a conversion.

Q. Who did that work?

A. Fairbanks Aircraft Service.

Q. You replaced this 100 horse power with a 115 horse power, is that right?

A. We didn't replace it. It was the same engine converted.

Q. I see. Now, you stated that—I believe—that

(Testimony of Dean Phillips.)

the original purchase price of this aircraft was \$2,000.00, is that correct? A. That's correct.

Q. From whom did you purchase that aircraft?

A. Bruce Neilson.

Q. What does Mr. Neilson do?

A. He's some kind of an equipment operator, I believe.

Q. Here in the Territory?

A. I don't know where he is. I never knew him before we bought the aircraft.

Q. How many of you joined in the purchase of that aircraft? A. Three.

Q. And who were they?

A. Walter Bear, James Kelly and myself.

Q. And I assume then that Walter Bear sold out? [114] A. That's correct.

Q. And he sold his interest to James Kelly?

A. That's correct.

Q. And you recall when he sold his interest to James Kelly?

A. Sometime in the spring, last spring, the spring of 1950 sometime. I don't recall. Sometime in the spring it was.

Q. Had you converted your aircraft at the time?

A. No, we had not.

Q. You had not converted? A. No.

Q. Had you bought any—had you changed the prop? A. Yes.

Q. And had you procured the floats at that time? A. No.

Q. Had you procured the skis at that time?

(Testimony of Dean Phillips.)

A. That's right, we had.

Q. Now, do you have any idea what the purchase price was for his interest? A. I do not.

Q. You do not know? A. I do not know.

Q. Have you ever talked to Kelly about it?

A. Kelly doesn't know anything about it. [115]

Q. Didn't (interrupted).

A. He didn't sell it.

Q. Didn't Kelly buy from Bear?

A. Pardon?

Q. Who bought Bear's interest?

A. Gray bought Bear's interest.

Q. Have you talked with Gray about how much he paid for it? A. I suppose I did.

Q. Do you remember how much he paid for it?

A. No, I don't.

Q. Now, from whom did you purchase this propeller?

A. United Air Motive. That's in Anchorage.

Q. That's an Anchorage outfit? A. Yes.

Q. When did you purchase it?

A. About June after we bought the aircraft, June or July, something like that. I don't exactly remember the date.

Q. When did you purchase the skis?

A. Purchased them in November.

Q. That would be November of when?

A. After we bought the aircraft, about approximately 7 or 8 months after we bought the aircraft.

Q. What year?

(Testimony of Dean Phillips.)

A. Well, that would be '49 I think. I am not sure. [116]

Q. And from whom did you buy the skis?

A. United Air Motive.

Q. And beefing the aircraft. You spoke of beefing. Who beefed it?

A. United Air Motive.

Q. Now, from the time you purchased this aircraft, Mr. Phillips, and the time that the aircraft was destroyed at Paxson Lodge, how many hours did you put on that aircraft?

A. Approximately 700 I would say.

Q. And was that one of the factors you considered in setting a reasonable value of \$3,000?

A. It was.

Q. Just exactly what kind of an allowance did you make for 700 hours use?

A. Well, we didn't figure that we were going to get \$2,000 alone for the airplane. We didn't figure—we didn't prorate the thing off on the hours it was flown. After all, it did have a newly overhauled engine in it which is practically as good as a new engine.

Q. Well, you just stated to me that you did make some allowance. I would like to know what kind of mental logistics you went through to make some kind of allowance for it?

A. We just figured the worth of the airplane at the time.

Q. How did you take 700 hours of flying into

(Testimony of Dean Phillips.)

consideration for figuring the worth of the airplane at the time? [117]

A. We looked up in the Trade-A-Plane to see how much they sold for.

Q. Do you recall the issue of the Trade-A-Plane you consulted?

A. No, I don't. They come out 3 times a month.

Q. What kind of information did you get from the Trade-A-Plane?

A. We took an average from the Trade-A-Plane and figured how much a float ship of that kind would cost in the states.

Q. New or used? A. Used.

Q. And does that \$3,000.00 figure, does that represent an average of the figures you extracted from the Trade-A-Plane? A. Yes, it does.

Q. You recall whether or not that issue of the Trade-A-Plane—when you consulted that issue of the Trade-A-Plane?

A. We looked at it before the accident. I always look at it.

Q. Would you roughly state how long before the accident you looked at it?

A. It comes out 3 times a month and I looked at it—every one of them.

Q. Did you take the average of several issues then?

A. Yes, because we were thinking of selling it.

Q. What kind of arrangement did you have with Jess Bachner with respect to this salvage, if any?

(Testimony of Dean Phillips.)

A. It was just stored there and after the accident when Mr. Heay seemed to have trouble paying it up, I talked to Mr. Heay about selling the stuff so that we could get some of our money out of it and he agreed that if Mr. Bachner could sell, let him go ahead. It wasn't doing anybody any good where it was.

Q. To whom was Mr. Bachner going to account for the proceeds of these sales?

A. Well, he was going to tell me about it for one.

Q. Were you going to get the money?

A. I was not.

Q. Who was going to get it?

A. I was going to hand it to my lawyer.

Q. This was after the suit was commenced?

A. It was before suit was commenced.

Q. When did you retain Mr. McNabb as counsel?

A. I don't remember the exact date.

Q. But the money was to be turned over to your attorney, is that correct?

A. To hold until this thing (interrupted).

Q. When did you make that arrangement with Mr. (interrupted).

A. I don't remember the exact date.

Q. Would you recall whether or not that was before the [119] 1st of November, 1950?

A. No, I don't believe it was. I am not sure.

Q. Sometime after the 1st of November, 1950?

A. I think it was. I am not sure.

Mr. Boggess: I have no further questions at this time, your Honor.

(Testimony of Dean Phillips.)

Mr. Parrish: If the Court please, I omitted to ask Mr. Phillips about the pictures that we offered as identifications. I am not sure whether he took them or Mr. Kelly took them and I would like permission to ask him about the pictures we have.

The Court: Very well.

Direct Examination

(Continued)

By Mr. Parrish:

Q. Mr. Phillips, I hand you plaintiffs' identifications 2, 3, 4, 5 and 6 and ask you if you know what those are? A. Yes, I do.

Q. Will you state what they are?

A. They're pictures of (interrupted).

Q. Are they photographic pictures?

A. Photographic pictures.

Q. Of what?

A. Of a Super Cruiser—Piper Super Cruiser, 3803 Mike.

Q. And when were they taken?

A. They were taken approximately the 23rd or 24th of [120] September.

Q. What year? A. 1950.

Q. What Super Cruiser appears in those pictures?

A. It's the one that Mr. Heay borrowed from us to fly to Paxson and Tango.

Q. Did you take the pictures? A. I did.

Q. With what kind of a camera did you take those pictures?

(Testimony of Dean Phillips.)

A. Speedgraphic, four by five.

Q. What time of the day did you take the pictures? A. It was approximately noon.

Q. Who developed the pictures?

A. Wyman's Photo Service.

Q. Do these pictures fairly represent what you took with your camera? A. It does.

Mr. Parrish: We offer them in evidence.

Mr. Bogges: I will object to their introduction, your Honor, because there is no showing that the aircraft was in that position immediately after the accident. This man doesn't know. He says he wasn't there until the 23rd.

The Court: Objection overruled, may [121] be admitted.

Clerk of the Court: Identification 2 is plaintiffs' exhibit "C"; identification 3 is plaintiffs' exhibit "D"; identification 4 is plaintiffs' exhibit "E"; plaintiffs' identification 5 is "F" and 6 is "G."

(Plaintiffs' Identification No. 2 was offered into evidence and received and marked Plaintiffs' Exhibit "C.")

(Plaintiffs' Identification No. 3 was offered into evidence and received and marked Plaintiffs' Exhibit "D.")

(Plaintiffs' Identification No. 4 was offered into evidence and received and marked Plaintiffs' Exhibit "E.")

(Testimony of Dean Phillips.)

(Plaintiffs' Identification No. 5 was offered into evidence and received and marked Plaintiffs' Exhibit "F.")

(Plaintiffs' Identification No. 6 was offered into evidence and received and marked Plaintiffs' Exhibit "G.")

Mr. Parrish: No further questions, your Honor.

Recross-Examination

By Mr. Boggess:

Q. When to the best of your recollection, Mr. Phillips, [122] did the subject of salvage first come up at any conversation with Doug Heay?

A. Well, after the engine was brought down from the accident.

Q. And when was the engine brought down from the accident?

A. Oh, I don't know. Sometime within a week or week and a half after the accident. I don't recall the exact date.

Q. You say a week to a week and a half after the accident?

A. To the best of my recollection. I don't remember exactly when it was.

Q. That would make it after you had taken those pictures in question? A. That's right.

Q. Didn't you state on cross-examination—on direct examination that you didn't know what the condition of salvage was on that aircraft at the time

(Testimony of Dean Phillips.)

you discussed it with Doug? A. That's right.

Q. Why didn't you know if you were up there taking pictures?

A. I didn't take the cowl off the engine. It looked like it was smashed. You would have to have some tools to get it off and I didn't have any. I didn't go up there to pick on the airplane.

Q. There wasn't any salvage except the engine from your observations without taking the cowling off?

A. I didn't even know if the engine was salvagable. [123]

Q. You didn't look?

A. I didn't look because we didn't have any tools to get it off.

Mr. Boggess: No further question, your Honor.

Mr. Parrish: That's all.

(At this time, Mr. Dean Phillips left the witness stand.)

The Court: We will take a ten minute recess.

(At this time, a short recess was taken and thereafter the trial of this cause was resumed.)

The Court: Counsel ready to continue?

Mr. McNabb: Ready, your Honor.

Mr. Boggess: Defendant is ready, your Honor.

The Court: Very well.

Mr. McNabb: May it please the Court, at this time, we have one witness—one more witness here,

your Honor, and I was wondering if after he finishes testifying if we could recess for the day. I make that request to the court for two reasons. Number one, our next witness is a gentleman who will require far more time when we get him on the stand until time for adjournment this evening which would necessitate calling him away from work today and [124] tomorrow. The second reason is Mr. Parrish is anxious to leave this evening for Anchorage. He is flying down there this afternoon, so if it would be convenient for the court, I would like to put this one remaining witness on and recess until tomorrow morning.

The Court: Any objection?

Mr. Boggess: I have no objection.

The Court: Very well.

FLOYD JAMES

called as a witness in behalf of the Plaintiffs, having been first duly sworn, testified as follows:

Direct Examination

By Mr. McNabb:

Q. Will you state your name, please?

A. Floyd James.

Q. Where do you reside, Mr. James?

A. 312-4th Avenue.

Q. In what city? A. Fairbanks.

Q. What is your occupation, Mr. James?

A. Shovel operator.

Q. Are you acquainted with Mr. Doug Heay

(Testimony of Floyd James.)

who is seated here? A. I have met him. [125]

Q. Have you ever had any business dealings with Mr. Heay? A. Yeah.

Q. And what were those? What was the nature of that transaction that you had with Mr. Heay?

A. I bought a set of skis from him.

Q. And did you have any conversation with Mr. Heay concerning skis?

A. Well, I called him up and asked him—I said, “I hear you have a set of skis for sale” and he says “Yes.”

Q. When did that conversation take place?

A. That was in October, towards the last part of October.

Q. Of what year? A. Last year.

Q. And where did you call him?

A. At his home.

Q. And what did Mr. Heay say to you?

A. Yes—he said yes he did have a set of skis for sale.

Q. And was there any further conversation between you and Mr. Heay?

A. Well, he said they were up at Phillips’ basement and to go up there and look at them. I went up and looked at them and went back and bought them.

Q. Did Mr. Heay tell you how much he wanted for the skis? A. \$150.

Q. And did you pay him for them? [126]

A. Yes, sir.

(Testimony of Floyd James.)

Clerk of the Court: Plaintiffs' identification number 8.

(At this time, a check dated October 25, 1950, payable to Douglas Heay, was introduced and marked as Plaintiffs' identification No. 8.)

Q. (By Mr. McNabb): Mr. James, I will show you plaintiffs' identification 8 and ask you if you know what that is?

A. It's the check I paid for the skis.

Q. Wait a minute, now. Would you turn that over? To whom is that check payable?

A. Douglas Heay.

Q. And whose signature is on it?

A. L. Floyd James.

Q. Who is L. Floyd James?

A. That's me.

Q. Will you turn that check over on the back, please? Whose endorsement is—is there any endorsement on that check?

A. Yes, Douglas Heay.

Q. And did you deliver that check to Mr. Heay?

A. Yes, sir.

Q. And for what did you deliver it to him?

A. For a set of skis. [127]

Q. Do you know where he got those skis?

A. Yes, sir.

Q. Where did he get them?

A. From an airplane that Phillips had.

Mr. McNabb: I will offer this check in evidence, your Honor, at this time.

(Testimony of Floyd James.)

Mr. Boggess: I have no objection.

The Court: May be admitted.

Clerk of the Court: Plaintiffs' exhibit "H."

(At this time, Plaintiffs' identification No. 8 was offered in evidence and received and marked as Plaintiffs' Exhibit "H.")

Mr. McNabb: That's all.

Cross-Examination

By Mr. Boggess:

Q. How did you learn that Doug Heay had skis for sale? A. I heard it out at the field.

Q. Do you recall who told you out at the field?

A. No, I don't, just airplane talk, you know. I heard Doug Heay had a set of skis for sale.

Q. Do you know whether your wife had previously called Mrs. Heay?

A. Yes, she had and she asked to have him call me back. [128]

Q. Now, when—where did you say these skis were? A. They were at Phillips' basement.

Q. Did you go out to Dean Phillips at that time?

A. I went out and looked at the skis, yes.

Q. And who told you to go to Dean Phillips to look at the skis?

A. Doug Heay told me they were out there.

Q. And did you have any conversation with Phillips at that time as to the value of the skis?

A. I told him what Doug Heay wanted for them.

(Testimony of Floyd James.)

Q. And what did he say when you (interrupted).

A. He said he's buying the plane, it's up to him.

Q. Did he make any comments that he thought that was an unreasonable amount?

A. No, sir.

Q. Do you recall having conversed with Doug Heay at any time when Doug told you that Phillips would set the price on the skis?

A. No, sir.

Q. And before you went out to see Phillips, did you know what the price of the skis were going to be?

A. I asked Doug Heay how much he wanted for them.

Q. How much did he say? A. \$150.

Mr. Boggess: That's all. [129]

Mr. McNabb: That's all.

(At this time, Mr. Floyd James left the witness stand.)

The Court: You wish to adjourn until the morning?

Mr. McNabb: Yes, your Honor, if we may, please.

The Court: Very well, until tomorrow morning, Mr. Clerk.

Clerk of the Court: Court is adjourned until 10 o'clock tomorrow morning.

(At 4:10 o'clock p.m., the trial of this cause was adjourned until 10 o'clock a.m., May 9th, 1951.)

Be It Remembered, that upon the 9th day of May at the hour of 10 o'clock a.m., the trial of this cause was resumed, plaintiffs and defendant represented by counsel, the Honorable Harry E. Pratt, District Judge, presiding:

The Court: Counsel ready to proceed with this trial?

Mr. Boggess: Ready, your Honor.

Mr. McNabb: Ready, your Honor.

The Court: Very well, proceed. [130]

Mr. McNabb: Mr. Clerk, will you swear this witness, please?

JESS G. BACHNER

called as a witness in behalf of the Plaintiffs, having been first duly sworn, testified as follows:

Direct Examination

By Mr. McNabb:

Q. Will you state your name, please?

A. Jess G. Bachner.

Q. How do you spell that?

A. B-a-c-h-n-e-r.

Q. Where do you reside, Mr. Bachner?

A. Fairbanks, 1010-9th.

Q. How long have you resided in Fairbanks?

A. Thirty-two years.

Q. What is your occupation, Mr. Bachner?

A. Aircraft mechanic.

Q. How long have you been an aircraft mechanic?

(Testimony of Jess G. Bachner.)

A. I have been working on airplanes for approximately 6 years and I have had my license for 3 years.

Q. Now, what type of license is that that you had for 3 years?

A. A and E, aircraft and engines.

Q. And by whom are you licensed? [131]

A. Civil Aeronautics Administration.

Q. And what is necessary, Mr. Bachner, to get such a license?

A. You're required to have two years practical experience plus passing their regular examination—written examination.

Q. Did you take that examination?

A. I did.

Q. When did you take the examination?

A. I will have to look and see. Ninth month, 13th day, 1948.

Q. And what was the outcome of that examination, Mr. Bachner?

A. I have the certificate here.

Q. And you are licensed as an aircraft mechanic, is that correct?

A. Aircraft and engine mechanic.

Q. And have you engaged actively in that occupation since the time that you received your license?

A. Yes, I have.

Q. Now, are you in business, Mr. Bachner?

A. Yes.

Q. And under what name do you do business?

A. Fairbanks Air Service.

(Testimony of Jess G. Bachner.)

Q. And where is your place of business?

A. Weeks Field. [132]

Q. Is that adjacent to Fairbanks?

A. That's in Fairbanks, yes.

Q. Now, Mr. Bachner, are you a licensed pilot?

A. Yes, I have airplane single engine land, airplane single engine sea and airplane multi-engine land.

Q. Where did you take your instruction, Mr. Bachner? A. At the Fairbanks Air Service.

Q. And when did you commence your instruction? A. 1944.

Q. When did you receive your license as a private (interrupted). A. December 15, 1945.

Q. And by whom was that license issued?

A. D. M. Gretzer, C. A. A. airman inspector.

Q. What do the initials C. A. A. represent?

A. Civil Aeronautics Administration.

Q. And have you been—has that license ever been revoked, Mr. Bachner?

A. No, it has not.

Q. Has it ever been suspended?

A. No, it has not.

Q. Is it at this time in full force and effect?

A. Yes, it is.

Q. For single engine land? A. Yes. [133]

Q. For single engine sea? A. Yes.

Q. And multi-engine land? A. Yes.

Q. You have those licenses then in force at this time, all of them? A. Yes, I do.

Q. You were licensed in what year?

(Testimony of Jess G. Bachner.)

A. 1945.

Q. In all of those types of—for all of those purposes?

A. No. That was just for the private license for single engine land.

Q. When did you receive your license for single engine sea? A. 1949.

Q. And when did you receive your license for multi-engine land? A. 1949 also.

Q. Now, Mr. Bachner, have you been flying continuously since your single engine land license was issued? A. Yes, I have.

Q. And how frequently have you operated an aircraft since your single engine land license was issued?

A. Well, I would say that there's never been more than a week gone by that I haven't flown.

Q. Do you have the log books showing the hours which you [134] have accumulated in these various types of aircraft? A. Yes, I do.

Q. Do you know now what those logs state?

A. No, offhand I couldn't say.

Q. Have you recorded all of the hours which you have spent flying?

A. No, no where near all of them.

Q. Well, can you state approximately how many hours you have in single engine land type aircraft?

A. I would say in the vicinity of 500.

Q. Now, could you state how many hours total flying time that you have?

A. Oh, it would be upwards of 650.

(Testimony of Jess G. Bachner.)

Q. That is, since your initial license was first issued, is that right? A. That's right.

Q. How many hours' instruction have you had, Mr. Bachner, in those various types of aircraft?

A. I had approximately 15 hours in single engine land and about 5 hours single engine sea and 11 hours in multi-engine land.

Q. Now, you stated that at no time have any of those licenses been suspended (interrupted).

A. No, they haven't.

Q. Or revoked? [135] A. No.

Q. Mr. Bachner, have you ever, while operating an aircraft, have you ever crashed? A. Yes.

Q. What was the nature of that accident?

A. Well, it was right on the home field.

Q. And was the cause for that accident determined? A. Yes.

Q. What was the cause of that accident?

A. Well, my own fault.

Q. When did that occur—when did that accident occur?

A. I think it was in '47. I couldn't—can't remember for sure.

Q. Your license was issued in 1945?

A. Yes.

Q. What is your principal occupation now, Mr. Bachner? A. Aircraft mechanic.

Q. And you operate a business of repairing aircraft, do you? A. Yes.

Q. Do you overhaul motors?

A. Yes, we do.

(Testimony of Jess G. Bachner.)

Q. What is your principal business, Mr. Bachner? That is, do you do more work in one particular field of aircraft mechanics than any other? [136]

A. No, it's just an overhaul shop, takes care of everything.

Q. Mr. Bachner, did you make a trip from Fairbanks, Alaska, to Paxson Lake—are you acquainted with Douglas Heay? A. Yes.

Q. Did you make a trip from Fairbanks, Alaska, to Paxson Lake with Mr. Heay last September?

A. No, not with him.

Q. Do you know whether Mr. Heay made a trip from Fairbanks, Alaska, by airplane to Paxson Lake last September?

A. I met Mr. Heay at Paxson Lake myself. He was there. I don't know how he got there, whether he flew or rode.

Q. But you did not fly to Paxson Lake with Mr. Heay, is that right? A. No, I did not, no.

Q. Now, on the morning of the 20th day of September last year, did you make a flight with Mr. Heay? A. Yes.

Q. Now, what airplane were you flying at that time? Who was operating that aircraft?

A. Mr. Heay.

Q. Do you know what airplane that was?

A. Yes, it was a Super Cruiser. I don't recall the number of it offhand.

Q. Do you know to whom the plane belonged?

A. Yes. [137]

Q. To whom did it belong?

(Testimony of Jess G. Bachner.)

A. It belonged to Dean Phillips and Charles Gray and Mr. Kelly.

Q. Did you ever have an occasion to work on that plane? A. Yes, we had.

Q. Were you familiar with it? A. Yes.

Q. How many hours have you worked on that airplane?

A. We just finished a complete major overhaul on the engine and installed the floats and relicensed the airplane which amounted to approximately \$750 worth of work.

Q. Now, Mr. Bachner, how long before this flight that you made with Mr. Heay did you do the work on that airplane?

A. Approximately three months.

Q. Do you know how many hours had been put on the plane between the time you made that overhaul and the date on which you made the flight with Mr. Heay? A. No, I don't.

Q. Now, you say the plane was relicensed. What do you mean it was relicensed?

A. An aircraft is required to have a thorough inspection throughout and relicensed once a year by the Civil Aeronautics Administration.

Q. What is necessary to be done to have a license reissued?

A. Any work found necessary to be done by the inspecting [138] mechanic.

Q. In this instance, who was the inspecting mechanic? A. Myself.

(Testimony of Jess G. Bachner.)

Q. Are you authorized by the C. A. A. to make those inspections? A. Yes, I am.

Q. And after the inspection, what did you do as an inspector? What are your duties after having made an inspection like that?

A. Well, you have to have work done on the airplane complying with anything you find wrong with it. You make out the usual forms.

Q. You inspected that aircraft, did you?

A. That's right.

Q. Do you recall what month you inspected it?

A. No, I don't.

Q. Do you recall what you found necessary to be done to that aircraft?

A. No, offhand I don't.

Q. Do you know what—whether anything was done to the aircraft to comply with your findings as an inspector? A. I couldn't say now.

Q. Do you know what work was done on that plane?

A. The engine was major overhauled as I said and the floats installed.

Q. Was any other work done to the [139] engine? A. No.

Q. Do you know the horsepower of that engine?

A. Yes.

Q. What was it? A. 115 horsepower.

Q. Had that engine always been a 115 horsepower engine? A. No.

Q. What had it previously been?

A. One hundred.

(Testimony of Jess G. Bachner.)

Q. Now, do you know who converted it from 100 to 115? A. Yes.

Q. Who did, Mr. Bachner? A. I did.

Q. What did you do to convert it?

A. You put in factory required parts for the conversion which amounts to a cam shaft and certain type cylinder.

Q. Did you do that work? A. Yes.

Q. What effect did the conversion from 100 to 115 horsepower engine have on the operation of that aircraft?

A. It increased the performance considerably.

Q. Did it increase the value of the aircraft?

A. Yes, it did.

Q. Was that plane relicensed?

A. Yes. [140]

Q. You say you do not recall when you made the inspection? A. No, I don't.

Q. Do you recall how long it took you to make this major overhaul on the plane?

A. No, I don't.

Q. You say you installed floats on the plane?

A. Yes.

Q. What were—what was the value of the floats?

A. \$1,200.00.

Q. How do you arrive at that figure?

A. That's the going figure that we get out of Trade-A-Plane. That's what we judge everything by. It's a national airplane paper which is issued twice monthly.

(Testimony of Jess G. Bachner.)

Q. Did you consult that publication to determine that value? A. Yes.

Q. Do you know what—do you now know the make of floats which was installed on that plane?

A. Yes.

Q. What was that? A. Edo.

Q. And you found quotations in Trade-A-Plane for that particular type of float? A. Yes.

Q. Is that the new price? [141]

A. No, that would have been at that time considering a differential for freight from the states to here.

Q. Now, was—were they new floats you put on that plane? A. No, they weren't.

Q. And in consulting this publication, did you take into consideration the condition of those floats at the time you put them on there? A. Yes.

Q. What would you say the condition of those floats were? A. Good.

Q. Now, at the time that you made this flight with Mr. Heay on the 20th of September, can you state as a mechanic and inspector your opinion as to the value of that airplane?

A. Well, as I say, according to Trade-A-Plane which is what we used for valuing anything of that sort, it is worth approximately \$3200 in the condition it was in.

Q. That is on the 20th day of September?

A. Yes.

Q. Now what—how did you arrive at that figure of \$3200?

(Testimony of Jess G. Bachner.)

A. We took an average of the prices of the same aircraft, the same year and model and approximately the same equipment on it.

Q. Well now, what equipment do you have reference to?

A. Oh, instruments and radio and things like that.

Q. Did that airplane have skis? [142]

A. It was on floats then.

Q. Well now, when you say though that you placed a value of \$3200 (interrupted).

A. Oh, yes, the skis were included.

Q. They were included in the price?

A. Uh-huh.

Q. Were you familiar with the skis which (interrupted).

A. No, I wasn't. I know what type of ski they were and what they were worth but I didn't know the particular skis. I never worked on them or anything.

Q. Well now, do you know whether that—what did you remove from that aircraft and put the floats on it?

A. Wheel—landing gear and wheels.

Q. And in arriving at your \$3200 figure, did you also consider the landing gear? A. Yes.

Q. Did you find quotations in the Trade-A-Plane for aircraft of that type with 115 horsepower engine? A. No.

Q. Did you—what did you do in arriving at

(Testimony of Jess G. Bachner.)

your \$3200 figure to take that additional 15 horse-power into consideration?

A. We didn't consider it.

Q. You didn't consider it? A. No. [143]

Q. How did you arrive then at the \$3,200 figure?

A. We took an average of the aircraft as it is listed in Trade-A-Plane, added the floats and adding the skis to it and allowing a \$500 differential for transportation from the states to Alaska which is an average.

Q. Well now, what do you mean the \$500 differential is an average?

A. Well, that's—all the people in the field, that's the way they figure when they fly an airplane from the states. They figure at least \$500. They figure an average of a \$500 cost.

Q. Is that customary in Fairbanks?

A. Yes.

Q. Regardless of the type of aircraft?

A. No. That would be—the bigger of course the more it would cost but it wouldn't amount to very much. It would just be gasoline cost.

Q. Do you believe \$500 represents the—a true and accurate figure for the differential?

A. Yes.

Q. Is that—in Fairbanks, is that \$500 generally considered to be a reasonable price?

A. That's right.

Q. Now, did you in determining this \$3,200 price, did you—is that as of the 20th day of September? [144]

(Testimony of Jess G. Bachner.)

A. No, that would be as of today.

The Court: That would be what?

The Witness: As of today.

Q. (By Mr. McNabb): \$3,200?

A. The last issue of Trade-A-Plane I should say.

Q. When did you make these computations?

A. Oh, in the last week, but the price is virtually the same. It hasn't hardly changed. It has changed very little in the last 6 months.

Q. Did you make any computations in September of last year as to the value of that aircraft?

A. No.

Q. Do you know what the Trade-A-Plane publication said about the value of that particular aircraft last September? A. No.

Q. Do you know the general fluctuations in the value of aircraft of that nature? A. No.

Q. You don't know that that airplane was worth \$3,200 in September or October or August of last year? A. No, not positively.

Q. Well, what is your opinion?

A. I think it was, yes.

Q. How do you arrive at that opinion, Mr. Bachner? [145]

A. Well, just from reading that Trade-A-Plane every time I get an issue and study it pretty carefully through everything, not only in that type of airplane but everything else and just over a period of time it just seems to me that that's right.

Q. How long have you been familiar with this publication, Trade-A-Plane?

(Testimony of Jess G. Bachner.)

A. Oh, about 5 years—6 years.

Q. And how frequently do you read it?

A. It is issued every 2 weeks.

Q. And do you read it every issue?

A. Yes.

Q. What type of aircraft work do you work on most, Mr. Bachner?

A. We work on all types under 7,000 pounds gross.

Q. Are you—are you particularly interested or is your work primarily on ships of the approximate size as the one under discussion today?

A. Yes.

Q. You are more familiar with that particular type of aircraft or small aircraft than you are with larger ones, is that right?

A. That's right; what is termed as light aircraft.

Q. And in your reading of Trade-A-Plane, do you pay more attention to smaller aircraft of the type of aircraft that [146] you work on?

A. That's right.

Q. Being familiar with that publication, would you say that \$3,200 figure which you base your value of that aircraft on at this time was approximately the same amount last year or last August?

A. Yes.

Q. Last September? A. Yes.

Q. Now, Mr. Bachner, where on the 20th day of September last year did you meet Mr. Heay?

A. At Paxson Lake.

(Testimony of Jess G. Bachner.)

Q. And did you go aboard the aircraft belonging to Dean Phillips with Mr. Heay? A. Yes.

Q. Was anyone else present in that airplane at that time? A. Yes.

Q. Who else was present?

A. Ernest Hubbard.

Q. And now, was that plane on wheels or floats at that time? A. Floats.

Q. Was it on the lake proper?

A. Yes.

Q. Now, what did you do after you got into that plane with [147] Mr. Heay and Mr. Hubbard? What did Mr. Heay do?

A. Well, we tried to take off and we couldn't make it so (interrupted).

Q. Well now, what do you mean you tried to take off? A. Tried to fly.

Q. Which direction did you go that time?

A. We started out in a southerly direction as I remember.

Q. And were you able to take off in that direction? A. No.

Q. What did Mr. Heay do then?

A. We came back and let Mr. Hubbard out.

Q. At what particular place did you let Mr. Hubbard out? A. At the Sportsman's Lodge.

Q. Is that the place you took off from originally? A. Yes.

Q. And then what did you do?

A. We tried to take off again.

(Testimony of Jess G. Bachner.)

Q. Do you know why you weren't able to take off the first time? A. Yes.

Q. Why were you unable to take off?

A. Because we had too much load for the amount of wind we had at that altitude.

Q. Now then, after you let Mr. Hubbard out of the aircraft, what did you do? [148]

A. We took off.

Q. Did you take off in the same direction?

A. No. As I remember, we took off to the north at that time.

Q. Were you able to get off that time?

A. Yes.

Q. Now, when you first tried to get off, was there any wind blowing, Mr. Bachner?

A. Very little.

Q. Do you recall the direction from which it was coming? A. No, I don't positively.

Q. Well, is it customary to take off into the wind? A. Yes, it is.

Q. And you started to take off in which direction first? A. South.

Q. And you weren't able to get off?

A. No.

Q. Is it reasonable to assume that you tried to take off into the wind on the first time?

A. Yes, it could be because the wind changes.

Q. Then in your opinion then, it was—would you have been taking off into the wind when you tried to take off south the first time?

(Testimony of Jess G. Bachner.)

A. We should have been. I didn't pay any attention to it myself. [149]

Q. Well now, you came back and after you let Mr. Hubbard out you took off in which direction?

A. North.

Q. Do you know whether you took off into the wind that time? A. I couldn't say, no.

Q. Is it customary to take off into the wind?

A. Yes.

Q. So if the normal procedure were followed, you took off into the wind that time?

A. That's right.

Q. Which means if normal customary procedure were followed in taking off, the wind had shifted by the time you started to take off first and when you let Mr. Hubbard out and tried to take off the second time? A. That's right.

Q. Now, as a mechanic and while you were taxiing and taking off, in your opinion was the motor in that airplane operating properly?

A. Yes, it was.

Q. Do you know whether the controls in the airplane were operating properly?

A. I think they were.

Q. Did it seem to respond to Mr. Heay's (interrupted). A. Yes. [150]

Q. (Continuing): Command? Now, you say you took off in a northerly direction. What did Mr. Heay do after he got the airplane airborne?

A. Well, we just started climbing.

(Testimony of Jess G. Bachner.)

Q. Do you know how rapidly you were climbing? A. No, I couldn't say.

Q. Do you know how fast you were flying?

A. No.

Q. Was the airplane laboring? A. No.

Q. Was it in a normal climb for that type of aircraft? A. I would say so, yes.

Q. Now, Mr. Bachner, I would like you to come down and look at this map. You say you took off in a northerly direction? A. That's right.

Q. Now, after you became airborne, what did you do or what course did that airplane follow?

A. Well as I remember, we went north along the east shore of the lake and made a 180 degree turn and came back along the west shore until the airplane went out of control.

Q. Did you come back down the lake and make a circle over the lake?

A. Not that I remember.

Q. Do you know whether you made a 360 degree turn over [151] that lake at any time?

A. Not that I can remember.

Q. Then after you took off, you didn't make any complete circle? A. I can't recall any.

Q. Well, have you attempted to refresh your memory at any time since that accident occurred as to exactly the course that was followed by that aircraft? A. No, I haven't.

Q. How much altitude—how far did you fly before you started toward the hills? How long had

(Testimony of Jess G. Bachner.)

you been in the air before you left the water—you got the airplane airborne but you stayed over the lake for a period of time, didn't you?

A. That's right.

Q. Now then, how long did you fly actually over the water before you headed—made this turn and headed for those hills?

A. Oh, I would say four to five minutes.

Q. You stayed over the water that long?

A. That's including the take-off, too.

Q. Now, when you say including take-off, do you mean the time you were taxiing? A. No.

Q. After the aircraft was actually [152] airborne? A. Yes.

Q. How fast does that plane fly, Mr. Bachner?

A. Well, at that altitude, it should have been flying about 70-75 miles an hour.

Q. Well now then, how long did you fly down that lake before Mr. Heay started this turn?

A. I couldn't say.

Q. Do you know how many miles you traveled down that lake? A. No, I don't.

Q. Do you know whether or not he got out on over the shore of the lake at the north end?

A. I don't believe so.

Q. You think he stayed on the lake all the time?

A. I think so.

Q. Was he continuing to climb that aircraft?

A. Yes.

Q. Do you recall that he made a 180 degree turn or thereabouts and came back down the lake?

(Testimony of Jess G. Bachner.)

A. Yes.

Q. Now, did he make a full 180 degree turn, Mr. Bachner?

A. No, I don't think so. It would have been about a 170 or 165 or a 170 degree turn.

Q. Do you know approximately how many ground miles you traveled from the time you got off the lake until you came [153] back over the lake and then started for the hills?

Mr. Boggess: I will object to that, your Honor, because this witness couldn't possibly determine the number of ground miles that was travelled, I don't believe.

The Witness: That's right.

The Court: Well, he can answer it. Objection overruled.

Q. (By Mr. McNabb): Well now, can you estimate the number of ground miles you traveled?

A. No, I wouldn't attempt to.

Q. But you know you were in the air 4 or 5 minutes, is that right? A. Yes.

Q. Now then, you headed toward the hills, is that correct? A. Not directly, no.

Q. Approximately what angle were you approaching those hills, Mr. Bachner?

A. Oh, as I remember, we had been approaching the hill at about a 40, 45 degree angle.

Q. Would you step down here again please, Mr. Bachner. Does the blue line which you see on this map marked from the point "X" to the point

(Testimony of Jess G. Bachner.)

double "X" truly represent the ridge of that hill toward which you were flying?

A. The general angle, yes, I would say so. [154]

Q. Does this blue line approaching the ridge of the hill from the northerly edge of the lake truly represent the angle at which that aircraft was approaching the ridge of the hill?

A. Yes, I would say so.

Q. That you believe appears to be a 45 degree angle? A. That's right.

Q. Now, Mr. Bachner, do you know approximately how much altitude that the airplane had as it left the lake? How high was it over the lake?

A. I would judge it to be approximately a thousand feet above the water.

Q. Was that below the ridge of the hill?

A. Yes.

Q. And you continued to approach the hill at approximately a 45 degree angle? A. Yes.

Q. How fast—do you know how fast the airplane was flying at that time?

A. No, I don't.

Q. Was it climbing?

A. I think so, slightly.

Q. Now then, as you approached the hill, what happened, Mr. Bachner?

A. Well, everything was normal in the airplane and it just [155] quit flying. It just went out of control.

Q. What happened when it went out of control?

A. It hit the ground.

(Testimony of Jess G. Bachner.)

Q. Well, what did Mr. Heay do when that airplane quit flying?

A. The only thing I could see him do is open the throttle wide open immediately.

Q. The plane had been flying then at something other than full throttle? A. That's right.

Q. Now, when the plane went out of control, approximately how much altitude did you have? How high above the hills at that particular place were you?

A. Well, I would say it was four to five hundred feet above the ground.

Q. And how close to the hills were you as you were approaching it?

A. Well, at the angle that hill is, between 800 to a 1000 feet.

The Court: I couldn't understand that.

The Witness: Between 800 and a 1000 feet.

Q. (By Mr. McNabb): Mr. Bachner, do you recall whether there was any wind [156] that day?

A. I think there was a slight wind, yes.

Q. Do you know which direction it was coming from? A. No, I couldn't say.

Q. Was the plane—did you notice any turbulence that—after it become airborne and started to approach the hill?

A. No, not any severe turbulence, no.

Q. Well, was the plane bouncing any?

A. Oh, I can't remember that good.

Q. Do you know what caused that aircraft to go out of control?

(Testimony of Jess G. Bachner.)

A. I would say it was a down current of air,

Q. Was the motor functioning properly when it went out of control? A. Yes, it was.

Q. Did it continue to function properly?

A. Yes, it did.

Q. Now, exactly what did Mr. Heay do other than put on more throttle?

A. I don't know. The only thing I had to look at was the back of his shirt.

Q. What did the airplane do?

A. It went right straight to the ground nose first.

Q. Nose first? After you started to fall, did you recover? Did you recover any at all? [157]

A. No.

Q. Could you tell from Mr. Heay's actions whether he was attempting to recover?

A. I would say he was.

Q. Do you know whether he was successful or not in making any recovery at all?

A. I don't think so.

Q. Did you feel the airplane take hold any?

A. No.

Q. Did Mr. Heay make any turns? Did the aircraft—that is, did the aircraft turn any?

A. It made a slight turn, yes.

Q. Which direction was that turn made?

A. To the right or into the hill.

Q. A turn into the hill? A. Yes.

Q. It didn't turn down the hill?

A. No.

(Testimony of Jess G. Bachner.)

Q. Well now, turning into the hill, would you have had more or less altitude or more or less distance to travel than when that plane started flying?

A. We had less.

Q. Do you know whether the wind could have turned you into that hill?

A. Yes, it could have.

Q. Do you know whether the wind turned you into that hill, [158] Mr Bachner?

A. No, I don't.

Q. Mr. Bachner, do you know whether wind currents of that type are normal in mountainous country? A. Yes, they are.

Q. What could Mr. Heay have done to have recovered from—was there anything he could have done to have recovered the control of that airplane?

A. No, I don't think so.

Q. Have you had any experience in flying in that type of country, Mr. Bachner? A. Yes.

Q. Have you had occasion to discuss flying in that type of country with other pilots?

A. Yes.

Q. Do you know the general procedure in flying in that type of country? A. Yes.

Q. Do you know, Mr. Bachner, what is done by pilots who fly in that type of country to prevent the very thing which occurred that day?

A. Well, no two pilots fly alike and some pilots are extra cautious and some are—well, they take chances and some just go along normally and go

(Testimony of Jess G. Bachner.)

half way one time and half way the other time so it is pretty hard to say. [159]

Q. Do you think that Mr. Heay took a chance?

A. According to my flying standards, I would say so, yes.

Q. What do you believe he should have done?

A. Stayed more over the water out in the middle of the valley until he got enough altitude.

Q. You think he approached the hill with too little altitude? A. Yes.

Q. What do you think actually caused that airplane to strike the ground—crash to the ground?

A. A down current of air.

Q. In the event that you had had more altitude, would you have had more opportunity to have recovered? A. Possibly.

Q. In your opinion, Mr. Bachner, how much altitude should Mr. Heay have had before he approached those hills?

A. I always cross them at least a thousand feet above the crest of the hill.

Q. And at the time you approached those hills, you were considerably under the crest of the hill, were you not? A. That's right.

Q. Mr. Bachner, I will show you plaintiffs' exhibit "A" and ask you if you know what that is?

A. That's the hill, Paxson Lake.

Q. Now, do you see there an ink spot on that photograph? [160] A. Yes, I do.

Q. Does that represent the approximate location of the spot at which that airplane crashed?

(Testimony of Jess G. Bachner.)

A. Yes, it does.

Q. Now, did you—I will hand you plaintiffs' exhibits "B" through "G" and ask you if you know what they are please. Do you know what those are, Mr. Bachner?

A. Yes, I do.

Q. Well now, do they truly represent the condition of that aircraft after it had crashed?

A. I would say so.

Q. Well, do you recall having seen that aircraft after it struck the ground?

A. I didn't look at it very good. We got out of it.

Q. Had you ever seen it since that time?

A. No, I haven't.

Mr. McNabb: Your Honor, may we have a recess at this time?

The Court: Yes, we will take a ten minute recess.

(At this time a ten minute recess was taken and thereafter the trial of this cause was resumed.)

(Mr. Jess Bachner resumed the witness stand.)

The Court: Counsel ready to proceed [161] with the trial of this case?

Mr. McNabb: Yes, your Honor.

Mr. Boggess: Yes, your Honor.

The Court: Very well.

Q. (By Mr. McNabb): Mr. Bachner, during the time that airplane was approaching those hills,

(Testimony of Jess G. Bachner.)

was it laboring? A. No, I wouldn't say so.

Q. What—do you know what the normal rate of climb for that plane is?

A. I would say 70 miles an hour is a good safe rate of climb.

Q. And at—how many feet per minute?

A. Well, that should give you about 300 feet a minute.

Q. Do you know whether it was in that attitude prior to the time you struck the (interrupted).

A. I don't know.

Q. (Continuing): Current of air? Do you know how much you weighed on the 20th of September, 1950? A. Yes, I do.

Q. How much did you weigh?

A. Approximately 210 pounds.

Q. Was the plane overloaded?

A. No, I wouldn't say so.

Mr. McNabb: That's all the questions [162] I have.

Cross-Examination

By Mr. Boggess:

Q. Jess, do you remember how many hours were on Phillips' plane at the time of your major overhaul? A. No, I don't.

Q. Do you know whether or not the Civil Aeronautics Administration requires overhauls to be made after a certain amount of hours have been flown? A. They do not on a private airplane.

Q. Only on commercial aircraft?

(Testimony of Jess G. Bachner.)

A. That's right.

Q. Now, would you state again, Jess, what the cost of this major overhaul together with the engine conversion amounted to?

A. I would say approximately \$750.

Q. Did you do that work? A. Yes.

Q. Do you remember what you billed the clients for that work? A. No, I don't.

Q. Now, how much of that work—would would be the cost of the reconversion without the overhaul?

A. Well, you have to tear the engine down completely to [163] make the conversion. Therefore, we have never converted one without overhauling it.

Q. Is there any way you can make an estimate of the separate cost of converting without overhauling? A. No.

Q. You have referred to the Trade-A-Plane quite often on direct examination, Jess. Do you have, you say, past issues of the Trade-A-Plane?

A. Yes.

Q. Do you have all the past issues of the Trade-A-Plane for the past say 3 years? A. No.

Q. You do not? A. No.

Q. How long have you been saving issues of the Trade-A-Plane?

A. Oh, I probably have three or four back issues now.

Q. Three or four back issues. Now you say you arrived at the approximate value of \$3,200 for an

(Testimony of Jess G. Bachner.)

aircraft of this type, float equipped and with ski accessory and landing gear, is that right?

A. That's right.

Q. By examining the most recent issues of the Trade-A-Plane, is that right?

A. That's right. [164]

Q. Do you recall, Jess, how many planes you found of this particular make and with these accessories in the last issue of the Trade-A-Plane?

A. I think there was about 8.

Q. There were about 8? Now, as I understand it, the Trade-A-Plane lists types of aircraft separately, is that correct?

A. That's correct.

Q. Now, if you were looking for a float plane of a particular type of aircraft, would you look under the column headed by that type of aircraft or would you look elsewhere in the Trade-A-Plane.

A. You would look elsewhere.

Q. And where would you look?

A. Under the column float equipped aircraft?

Q. And did you find 8 float equipped aircraft of this type in the last issue of the Trade-A-Plane?

A. No.

Q. How many did you find, Jess?

A. I don't recall ever looking in the float equipped section.

Q. Well then, how did you arrive at a figure of \$3200 without consulting the float section of the Trade-A-Plane?

A. I took the price of the aircraft itself and

(Testimony of Jess G. Bachner.)

added the price of the—going price of the floats plus the price of [165] the skis.

Q. Now, was that price of the floats and skis new or used? A. Used.

Q. The Trade-A-Plane as a matter of fact just lists used items, isn't that correct?

A. That's correct.

Q. You think that is a fair method of valuation, Jess? A. I think so.

Q. You do? Now, when you overhaul an engine, Jess, do you think that the aircraft is increased in value the amount of the overhaul or the cost of the overhaul? A. Yes.

Q. Whatever the labor cost of the overhaul is, you think the aircraft is increased that much in value, is that correct? A. That's right.

Q. Well, Jess, in your reading of the past issues of the Trade-A-Plane, would you be prepared to make an estimate of the value of that aircraft, that is its market value in the condition it was at the time of the accident without taking into consideration the accessories which were not on the aircraft at that time?

A. Will you state that again please?

Q. Well, what I am driving at is I would like to have your opinion of the market value of that aircraft according [166] to your perusal of the Trade-A-Plane at the time it was wrecked in the condition that it was in immediately prior to the time it was wrecked and without taking into con-

(Testimony of Jess G. Bachner.)

sideration these accessories which were not on the plane at that time?

Mr. McNabb: You Honor, I think that Mr. Boggess should state the particular items which he wishes excluded.

Mr. Boggess: Jess has already testified, your Honor, that he was conversant with the aircraft.

The Court: Objection overruled.

Q. (By Mr. Boggess): The aircraft just as it struck the ground without considering any other factors—just before it struck the ground.

A. Well, I would say it was worth \$3,000.

Q. Now perhaps you didn't understand me, Jess. You testified that the aircraft—the value of the aircraft taking into consideration the removed wheels and gear and the removed skis was \$3200.

A. Approximately.

Q. Now what I am asking you is what was the value of that aircraft, a float equipped aircraft in which you were riding that day without taking into consideration the value of the skis, the wheels and the landing gear? Surely it [167] wasn't worth \$3,000 if you arrived at a reasonable value by considering these other matters.

A. Well, there's two factors there that we haven't considered. That's overhauling the engine and the fact that there was the controllable propeller on the airplane which I didn't figure in the \$3200 originally.

Q. Is it still your opinion then that that air-

(Testimony of Jess G. Bachner.)

craft was worth \$3,000 just before it struck the ground? A. I think so.

Q. How much in your opinion are skis worth?

A. Approximately \$175.

Q. And how much in your opinion was the landing gear and wheels worth? A. About \$150.

Q. Now, Jess, what was your position in the aircraft at take-off and immediately prior to the accident? Where were you sitting in the aircraft?

A. Directly behind the pilot.

Q. Now, how tall are you, Jess?

A. Five, four.

Q. Now, did you have your safety belt on at all times from the time you took off until the time you struck the ground? A. Yes, sir.

Q. Now, sitting in an aircraft of that nature in the rear [168] seat, Jess, can you see over the side? A. Out the side of the aircraft?

Q. Yes. A. Yes.

Q. You mean you are tall enough that you can see over the side of the aircraft? A. Oh, yes.

Q. And were you at any time prior to the accident looking over the side of the aircraft and making any observations?

A. Not particularly, no.

Q. Isn't it true, Jess, that you could have made a 360 degree circle just as easily as you could have made a 180 degree turn to which you refer?

A. That's right.

Mr. McNabb: Now, just a minute. I object to that question as not material, it has no bearing

(Testimony of Jess G. Bachner.)

on the issues of this case whether he could have made a 360 degree turn.

Mr. Boggess: All right, I will reframe my question, your Honor.

The Court: All right.

Q. (By Mr. Boggess): Let's state it this way, Jess. Do you know positively that he only turned 180 degrees? A. No. [169]

Q. Do you have a compass in the rear seat?

A. No.

Q. From your position in that aircraft, Jess, can you see the horizon? A. No.

Q. Can you state positively, Jess, that you were only 4 or 5 minutes over the water? A. No.

Q. Would you state, Jess, what if any physical sensation of any peculiarity you had at the time you stated Doug lost control of the aircraft?

A. Will you state that again please?

Q. Did you have any peculiar physical sensation at the time you stated Doug lost control of the aircraft? A. No.

Q. Were you rammed up against your safety belt? A. Possibly I was, must have been.

Q. You don't recall? A. I don't recall.

Q. In your experience as a flyer, Jess, and the many times you have ridden I presume as a passenger, have you ever ran into a vertical air current that gave you the impression of so much velocity? A. No.

Q. In your experience—Jess, have you flown in the [170] Paxson Lake country often?

(Testimony of Jess G. Bachner.)

A. Yes.

Q. How many times would you say you have been up in that country?

A. Oh, 12, 15 times probably.

Q. I see. Have you flown over the crest of that hill on several occasions?

A. Yes.

Q. Have you ever run into any similar condition near or over the crest of that hill?

A. No, I haven't.

Q. Jess, you stated on direct examination that Doug thrust the throttle forward giving it more power at the time he lost control of the aircraft or just immediately after he lost control of the aircraft.

A. Yes.

Q. Did you see Doug hit the throttle?

A. Yes.

Q. You did see him hit the throttle?

A. I think I can remember that, yes.

Q. If he had also hit the stick in order to drop the nose, could you have seen that from your position?

A. No.

Q. And you do know that the nose did drop, is that correct?

A. Yes. [171]

Q. Now, Jess, you stated you were an overcautious pilot and there were varying degrees of caution exercised by pilots, is that correct?

Mr. McNabb: I object to that, your Honor, on the grounds that as I recall the testimony, he said different pilots flew differently but he never did state he was an over conservative pilot.

The Court: Objection sustained.

(Testimony of Jess G. Bachner.)

Q. (By Mr. Boggess): Are you, Jess?

Mr. McNabb: Now, just a minute. Are you what?

Q. (By Mr. Boggess): Are you what is known as an overly cautious pilot?

Mr. McNabb: I object to that on the grounds that is a phrase which cannot be correctly interpreted.

Q. (By Mr. Boggess): Do you exercise—all right, I will withdraw my question, your Honor and reframe it. Do you feel that you exercise more caution than the average pilot?

A. I feel that I do, yes.

Q. Jess, would you step down here a minute? You see that cross there, that “X”?

A. Yes. [172]

Q. Do you know what that “X” indicates on that map? A. Yes.

Q. What does it indicate?

A. It indicates the point of the mountain or hill.

Q. Now, in your opinion, Jess, would—what would be the safest way to depart from Paxson Lake going in a westerly direction?

Mr. McNabb: Now, I object to that question, your Honor, no proper foundation laid for it.

Mr. Boggess: Well, the foundation has already been laid. This man is a qualified pilot and a man of long experience in the aircraft industry, your Honor.

Mr. McNabb: There are many things which determine a safe way to leave any place and ap-

(Testimony of Jess G. Bachner.)

proach any thing, particularly altitude which has not been mentioned in the question.

The Court: You can bring out those points in your redirect examination if you like. Objection is overruled.

Q. (By Mr. Boggess): Would you answer the question, Jess?

A. Will you state the question again, sir?

Q. All right. In your opinion—just a moment. Will the reporter read the question back?

(The question was read to the witness as follows: [173] “Q. Now, in your opinion, Jess, would—what would be the safest way to depart from Paxson Lake going in a westerly direction?”)

The Witness: Well, in my opinion, the way I always do is circle before I ever start up.

The Court: You what before you start up?

The Witness: Circle the lake until we have sufficient altitude.

Q. (By Mr. Boggess): And what do you consider sufficient altitude departing from the lake, at the point of departure from the lake?

A. I don't recall the exact altitude there now.

Q. Well, I mean altitude above the lake?

A. Well, I would say at least a thousand feet above the crest of the hill. I don't know how much that would be above the lake.

Q. When you spoke of the crest of the hill, Jess, do you mean the crest of the hill marked “X”?

(Testimony of Jess G. Bachner.)

A. No, the crest of the hill at any point you may take to cross it.

Q. Now the contour lines on this map, Jess, indicate that the crest of the hill at the point where it would have been passed had Doug continued his flight is about 800 feet above the level of the lake. Does that seem accurate? [174]

Mr. McNabb: Now, just a minute. Mr. Reporter, read that question please.

(The question was read by the reporter as follows: "Q. Now the contour lines on this map, Jess, indicate that the crest of the hill at the point where it would have been passed had Doug continued his flight is about 800 feet above the level of the lake. Does that seem accurate?")

Mr. McNabb: Now, your Honor, this witness has not testified as to where Mr. Heay would have crossed that hill had he continued in his flight. The question is not material to the issues and no proper foundation has been laid for it. There's no showing that—I don't know whether Mr. Boggess is testifying from the map or how he has arrived at his 800 feet.

The Court: Read that question again please?

(The question was read as follows: "Q. Now the contour lines on this map, Jess, indicate that the crest of the hill at the point where it would have been passed had Doug continued his flight

(Testimony of Jess G. Bachner.)

is about 800 feet above the level of the lake.
Does that seem accurate?"')

The Court: Objection overruled.

The Witness: Well, I wouldn't have any way of knowing. [175]

Q. (By Mr. Boggess): Assuming, Jess, that is accurate, do you think in your opinion as a pilot that the defendant in having circled to an altitude of approximately 1,000 feet above the lake or having attained an altitude of approximately 1,000 feet above the lake and then proceeding in a climbing attitude towards that point, in your opinion, was he exercising due care? A. No.

Q. What would have constituted the exercise of due care, Jess?

A. You mean what should he have done?

Q. Uh-huh.

A. You said that was 800 feet above the lake. In my way, I do as I stated before, you should have at least 1,000 feet above the top of the hill wherever you're going to cross it.

Q. You believe he should have been 1,800 feet over the lake when he departed from the shore of the lake, is that correct? A. That's correct.

Q. In your experience as a pilot, Jess, in that particular country, have you ever flown over that crest at less than a thousand feet?

A. I couldn't say.

Q. Do you think, Jess, that assuming a person followed your procedure and circled until he had

(Testimony of Jess G. Bachner.)

attained an altitude of at least 1,000 feet above the altitude of the crest towards [176] which he was heading, do you think that had he done that and then had he experienced a vertical air current of the type that you experienced that day, do you think he would have been able to recover?

Mr. McNabb: Now, just a minute before you answer that question. I object to it, your Honor, on the grounds that there is no showing—it is not relevant and there is no showing that there would have been an air current of the nature of the one which struck here had he attained a thousand feet altitude over the crest of that hill.

The Court: Objection overruled, you may answer.

The Witness: Will you state the question again please?

Mr. Boggess: Would you read the question back, Mr. Reporter?

(The question was read to the witness as follows: “Q. Do you think, Jess, that assuming a person followed your procedure and circled until he had attained an altitude of at least 1,000 feet above the altitude of the crest towards which he was heading, do you think that had he done that and then had he experienced a vertical air current of the type that you experienced that day, do you think he would have been able to recover?’”)

The Witness: I don't know. [177]

(Testimony of Jess G. Bachner.)

Q. (By Mr. Boggess): Jess, from your experiences as an aircraft mechanic and as a pilot, what effect if any would there be on the number of revolutions per minute of a prop when an aircraft struck a vertical air current? Would there be any—I will rephrase my question. Would there be any effect at all on the number of revolutions per minute of a prop when an aircraft struck a vertical air current?

Mr. McNabb: I object to that on the grounds it is not relevant nor material to the issues in this case, your Honor.

The Court: Objection overruled.

The Witness: I don't know.

Q. (By Mr. Boggess): You don't know whether there would be any effect or not?

A. There could be and there—there is no way of determining that.

Q. Is it possible it might have revved up?

A. Yes.

Q. Do you recall, Jess, in which direction you were heading immediately prior to the time that you struck the ground? A. No.

Q. You do not? I have no further questions.

Mr. McNabb: Just a minute, please. [178]

Redirect Examination

By Mr. McNabb:

Q. Now, Mr. Bachner, you set the reasonable value of that aircraft at \$3,200.00?

A. That's right.

Q. Then you stated that without the skis and

(Testimony of Jess G. Bachner.)

without the landing gear you believe it to be worth the reasonable value of \$3,000.00, is that correct?

A. The condition it was in just before it struck the ground, yes.

Q. Yes. Now, you state that you believe the reasonable value of the skis to be \$175.00, is that correct?

A. That's right.

Q. And the reasonable value of the landing gear and wheels to be \$150.00?

A. That's right.

Q. Now, purely then a matter of mathematics, \$175.00 for skis and \$150.00 for landing gear and wheels is \$325.00 and from \$3,200.00 that leaves \$2,875.00.

A. That's right.

Q. Now, how do you arrive—what is the—what are your mental processes—what mental gymnastics did you go through to result with a \$3,000.00 figure using simple arithmetic to come out at \$2,875.00?

Q. As I told him, we didn't consider the prop and the [179] overhauling of the engine in the \$3,200.00 approximate figure I gave.

Q. I didn't understand your last statement.

A. I say as I told him we didn't include the fact that it had a controllable propeller and overhauling the engine at the time I give you the approximate figure of \$3,200.00.

Q. Well then, how much was that controllable propeller worth?

A. It is worth approximately \$290.00 new.

Q. Well, at the time, what—at the time of the crash, just prior to the crash, how much was it worth?

(Testimony of Jess G. Bachner.)

A. I wouldn't know. It would depend on what condition it was in.

Q. Well, did you examine that prop at the time you made that major overhaul? A. Yes.

Q. Well what condition was it in at that time?

A. It was in good condition.

Q. Now, did you have any occasion to see that aircraft or look at that prop between the time that you made the major overhaul and the time it crashed? A. No.

Q. You don't know what condition it was in then? A. No.

Q. How much was it worth when you examined it when you [180] made the major overhaul?

A. Well, I would say it would be worth at least \$200.00.

Q. And to the best of your knowledge, if anything had been wrong with that prop, would you have detected it from the operating of the aircraft?

A. Yes.

Q. Then can you state with reasonable certainty that the prop was in practically the same condition at the time of the crash that it was when you examined it when you made the major overhaul?

A. I think it was, yes.

Q. Now, the prop was worth how much when you made the major overhaul?

A. I judge it to be approximately \$200.00.

Q. Now, how much do you judge it to be if you believe it was in approximately the same condition at the time of the crash as it was at the time you

(Testimony of Jess G. Bachner.)

made the major overhaul, how much do you estimate the value of that prop to be just prior to the crash?

A. I don't know. I don't know how much time they put on it. Water is awfully hard on propellers.

Q. All you can say about the prop is that a few weeks prior to the crash when you examined it, it was worth about \$200.00?

A. That's right. [181]

Q. And that increased—using that \$200.00 figure, that would have increased the price of the value of the plane at the time of the crash at \$3,400.00?

A. No. The value of the airplane as it was at the time of the crash which didn't include the landing gear, skis or (interrupted).

Q. Well, now, Jess, here's what I want to know. You stated that at the time of the crash the airplane was worth \$3,200.00?

A. No, I did not.

Q. Well, at the time of the crash, how much was the airplane worth?

A. As it was at the time of the crash?

Q. Just as that airplane was before the instant before it hit the ground. What was the reasonable value of it with that prop, with that motor, with those wings, with that set of skis—wheels or floats on there, how much was that mechanical device which we know as an airplane worth just before it hit the ground?

A. Three thousand dollars, as I said.

Q. Just as it hit the ground it was worth that

(Testimony of Jess G. Bachner.)

much and you are not talking about skis or anything else? A. No.

Q. Now, when did you last see the skis—did you ever see the skis on that (interrupted).

A. No, I didn't. [182]

Q. So you don't know definitely that those particular skis were worth \$175.00?

A. No, I don't.

Q. How did you arrive at this \$175.00 figure?

A. It's just an average, a going price for that type of ski.

Q. And in what condition?

A. In fair condition.

Q. Is the same thing true of the landing gear and wheels? A. That's true.

Q. Now, Jess, how do you arrive at your statement that you were four, five minutes over the water?

A. Well, it's just merely a guess. There's no way to arrive at any positive time.

Q. Now, do you believe you would have known it had you made a complete circle over that lake?

A. I don't know. It's possible. A person just doesn't pay any attention to those things.

Q. Now, Mr. Bachner, let us assume that—well, was that airplane climbing from the time it took off the water until it crossed (interrupted).

A. I think so.

Q. Do you know whether it was or not?

A. No.

Q. You don't know whether it was or not? [183]

(Testimony of Jess G. Bachner.)

A. No.

Q. How many times do you say you have crossed those hills?

A. I would say 12 or 15 times, somewhere in that neighborhood.

Q. Were you piloting the aircraft all of those occasions? A. Yes.

Q. You never crossed them prior to that time as a passenger? A. Not that I recall now, no.

Q. Now, Mr. Bachner, why do you want a thousand feet altitude over the crest of the hill before you start approaching it?

A. Well, I am personally a high flyer, that's all.

Q. Well (interrupted).

A. I like to go as high as I can get.

Q. What reason do you have for wanting a thousand feet altitude?

A. The more altitude you have, the safer you are.

Q. Safer from what?

A. From the ground.

Q. What reason would you have for striking the ground if the plane is operating and the motor didn't fail?

A. Nobody knows. Anything can happen.

Q. You think it is a safe policy to fly high?

A. That's right.

Q. Did you ever approach that hill the other times that [184] you had flown down there in the manner in which you approached that day with Mr. Heay? A. Not that I remember. Oh, no.

(Testimony of Jess G. Bachner.)

Q. Would you have remembered it if you approached it that way? A. I don't know.

Q. Do you think he approached that hill in a safe manner? A. Personally, no.

Q. Do you think you crossed that hill at a thousand feet every time you went over?

A. I don't know.

Q. Is it your policy to cross that high?

A. Yes.

Q. You think it is reasonable to assume that you crossed at a thousand feet altitude over the crest then? A. I think so.

Q. You say you never hit a downdraft when you went that high? A. No.

Q. Did you ever hit any downdrafts at that height as you crossed those hills?

A. Not that I can remember of, no.

Q. Do you believe if you had been a thousand feet high that day that you would have not struck that downdraft? A. I couldn't say. [185]

Q. Well, do you know how those air currents run down there? A. No.

Q. Are you familiar with movements of air masses? A. No, not particularly.

Q. Well, if you had been a thousand feet and hit that downdraft, that same downdraft, would the possibility of recovery have been greater or less?

A. It would have been less.

Q. With a thousand feet (interrupted).

A. Wait a minute, now.

(Testimony of Jess G. Bachner.)

Q. If you had a thousand feet altitude over the crest of that hill and hit that downdraft, would the possibilities of recovering, in other words, the possibilities of avoiding striking the ground, would they have been greater or less.

A. They would have been greater. The more altitude you have the better off you are at any time.

Q. You think then that if you hit that same downdraft with a thousand feet altitude, you would have more chance of recovery?

A. That's right.

Q. It would have been safer?

A. That's right.

Q. Is that the reason you fly a thousand feet?

A. Yes. [186]

Q. Is it reasonable to assume flying in that country you might hit a downdraft if you fly as he flew?

A. Yes.

Q. Is that the reason you want a thousand feet?

A. Yes.

Mr. McNabb: That's all.

Recross-Examination

By Mr. Boggess:

Q. You would fly 60,000 feet if you can get it, wouldn't you, Jess? A. That's right.

Q. Jess, you have testified that you determined the basic value of this aircraft minus skis and floats and so forth from your perusal of the Trade-A-Plane (interrupted). A. That's right.

(Testimony of Jess G. Bachner.)

Q. (Continuing): —is that correct? Now, in your opinion, from your perusal of the Trade-A-Plane and your own dealings in aircraft, is it a fair valuation of an aircraft to take its basic value minus these accessories and then add the accessories to it in order to obtain its market value?

A. I think so.

Q. I believe you also testified that the Trade-A-Plane you consulted was the last issue of the Trade-A-Plane? A. That's right. [187]

Q. Now, Jess, have you noticed any scarcity in available materials for repairing aircrafts and instruments and so forth recently? A. No.

Mr. McNabb: Now, just a minute. Well, it doesn't make any difference.

Q. (By Mr. Boggess): You haven't?

A. Not yet.

Q. You haven't noticed any adjustment upward on the price of aircrafts from the day of the accident until today?

A. Not of that particular type, no.

Mr. Boggess: That's all.

Redirect Examination

By Mr. McNabb:

Q. Jess, do you believe that you would—how much safer would you be at 60,000 feet than 1,000 feet? A. Just 60 times.

Q. You think you would be 60 times safer up there? A. Yes.

Mr. McNabb: I have no further questions.

(Mr. Jess Bachner left the witness [188] stand.)

Mr. McNabb: Your Honor, the witness which I had planned to call following Mr. Bachner had to go to Fort Yukon this morning and he will be back at two o'clock. If we can have a recess until that time (interrupted).

The Court: Very well. Nothing on during the noon hour is there, Mr. Clerk?

The Clerk: No, there is not, your Honor.

The Court: All right. Recess until two o'clock.

The Clerk: Court is recessed until two o'clock.

(At 11:45 a.m., the trial of this cause was recessed until two o'clock p.m.)

(At 2:00 o'clock p.m., the trial of this case was resumed.)

The Court: Counsel ready to continue with the trial?

Mr. McNabb: Ready, your Honor.

Mr. Boggess: Yes, your Honor.

The Court: Very well.

Mr. McNabb: Call Mr. Acord, please. Just step up here in front of the Clerk and be sworn, Mr. Acord. [189]

RANDALL K. ACORD

called as a witness in behalf of the Plaintiffs, having been first duly sworn, testified as follows:

Direct Examination

By Mr. McNabb:

Q. Will you state your name, please?

A. Randall K. Acord.

Q. Where do you reside, Mr. Acord?

A. Fairbanks, Alaska.

Q. What is your occupation?

A. Sales representative and commercial pilot.

Q. Are you a licensed pilot?

A. That is correct.

Q. By whom are you licensed, Mr. Acord?

A. C.A.A., commercial single, multiple engine land; instrument; that's all.

Q. And how long have you had that license—those licenses, Mr. Acord?

A. Well, my flying started in August, 1941, but I received my C.A.A. commercial license in April, '46. The previous time was with the air force.

Q. As a member of the armed forces, were you a pilot?

A. That's correct.

Q. How many hours have you had?

A. Well, I haven't totaled my log book lately, about 5,300 [190] and something, probably run around 5,400 now, maybe a little better.

Q. Has all that been in single engine aircraft?

A. No, that's been in everything from B-29's on down.

(Testimony of Randall K. Acord.)

Q. Do you have any single engine aircraft experience?

A. I have. I would say out of the 5,400 hours, there is about 3,000 hours of it in single engine since I was assigned to the fighter command of the air force.

Q. Have you had any experience operating what we non-pilots call light airplanes?

A. I have. I have owned two myself.

Q. That is, something with a 100 or 115 horsepower or in that general category?

A. And less.

Q. And less? How much of your flying have you done in Alaska?

A. As well as I remember, I had about 1,200 hours when I came to Alaska in '43, summer of '43.

Q. And the balance of your hours have been flown in Alaska, is that correct?

A. That's correct.

Q. How much of that time has been—how much—how many of the hours which you have flown in Alaska were flown in light aircraft?

A. Well, I put over 200 hours on that Luscomb before I [191] sold it and I figure 1,600 hours on my Beach now and other than what I have flown in the military such as L-5's and AT-6's, but, of course, that's higher horsepower.

Q. Have you had occasion to fly in the vicinity of Paxson Lake in Alaska? A. Many times.

Q. Well, approximately how many times have

(Testimony of Randall K. Acord.)

you flown over Paxson Lake or in the vicinity of Paxson Lake?

A. It would be hard to say exactly but I would estimate probably between 35 and 40 trips that I have made between here and Cordova and Valdez in the last three years just in selling alone. I will run about eight trips a year selling and I have charter trips to Valdez which takes you through that area.

Q. From the experience which you have had in that general vicinity, are you—have you become acquainted with the general weather and air movements of that area?

A. Generally speaking, yes.

Q. Are you familiar with Paxson Lake itself?

A. Well, I have landed on the strip many times at Paxson but I have never operated off the lake itself.

Q. But you are familiar with the general terrain in the vicinity of Paxson Lake?

A. Yes, I am.

Q. And the hills that are on either side of the lake? [192]

A. Yes, I am.

Q. And the pass? A. And the pass.

Q. And you have taken off that landing strip at Paxson? A. Yes.

Q. How much of your flying has been over mountainous country?

A. Gee, that's hard to say because every trip I have in Alaska—that you take in Alaska—unless it is from here to Nenana or somewhere, it is across a mountainous range somewhere.

(Testimony of Randall K. Acord.)

Q. You would say practically all of your flying has been in mountainous country?

A. It would involve crossing of high terrain somewhere en route.

Q. Now, Mr. Acord, assuming that a plane took off from Paxson Lake in a northerly direction, that plane being a Piper Super Cruiser with a 115 horsepower Lycoming engine, and assuming that the plane was climbing at approximately 70 miles an hour in a generally southwesterly direction and approaching the hills on the westerly side of Paxson Lake at an angle of 45 degrees and assuming that the wind was travelling in the generally southerly direction, the plane leaving the lake at approximately 1,000 feet altitude above the water and at a point under the ridge or the crest of the hill and at a point some place between 800 and 1,000 [193] feet from the hill side and from 500—4 to 500 feet above the ground, if the plane crashed to the earth nose first, assuming those facts to be true, can you state an opinion with any reasonable certainty as to the probable cause of that accident?

A. Well, an aircraft that crashes nose downward is usually—let me rescind that part. I would like to start that over. Many times pilots with thousands of hours of experience cannot distinguish a stall when it is approaching. That's been a proven fact by writers and pilots and even C.A.A. examinations for years. It is the reason for the invention and more or less required installation of these safe flight indicators which are—that the C.A.A. is try-

(Testimony of Randall K. Acord.)

ing to get required on all aircraft. It is now even on the military aircraft because pilots cannot recognize stalls. I know in my case many times I have tried to climb hills flying into the wind on the leeward side of the hill and not watching my air speed and I have noticed many times that I would approach a stall and not recognize it until I happened to look down at the air speed and see where I really was. In fact, I almost went into Mt. McKinley with a P-38 once and almost didn't recognize a stall in one of those. In anything else, I would have killed myself. You cannot recognize a stall especially if it is accompanied in a slight downdraft because the two are so similar. Most—almost all the aircraft that I have ever seen or read or heard about that have gone into [194] the ground due to downdrafts or failing to climb over hills or something like that when they were not stalled usually hit pancake—in other words, flat. Why this aircraft would go nose down I would say would probably be caused by a partial stall which the nose drops when a stall is encountered and maybe he was in a partial stall accompanied with a slight downdraft and that would more or less account for the nose being down. But if he was climbing and the downdraft pulled him into the ground and he was not stalled, he should have hit flat. Does that cover your question?

Q. Well now, can you state whether—can you state with reasonable certainty as to—in your opinion—what did, in fact, cause that accident?

A. Judge, I didn't go over this much before I

(Testimony of Randall K. Acord.)

came in here. I didn't think about it much so it will probably take a little time. (Pause.) Well, downdrafts are very frequent in that locality.

Q. Well, is that generally known to be true?

A. Well, generally, yes. In the Paxson Lake area the hills are not what you call sharp. They are more rounding and rounding hills will give you a downdraft without turbulence. Usually if a pilot encounters a downdraft, there is turbulence and he can recognize it much easier than he does if it is a small air downdraft or what I call small air downdrafts. But I would say from past experience and from [195] reading of other articles—in fact, the Daily News Miner had articles in it just recently written by Mr. Gretzer, the chief airman of the C.A.A. for this region, on pilot's failure to recognize stalls or partial stalls when trying to climb over hills and downdrafts or something like that. But those things usually can be recognized if the downdraft is of any intensity or if you see that you can't get over a hill, you can usually recognize that fact far enough ahead that it is no trouble to turn around and go back down the hill even if you have to lose a little altitude to go back down the hill to gain your speed back because I know I have had to do that a few times myself when I would be heavily loaded in some low-powered aircraft.

Q. Well now, as a safety factor, what is normally done? What do people or a reasonably prudent pilot do in approaching hills to prevent finding himself in a position from which he cannot recover?

(Testimony of Randall K. Acord.)

A. Well, I know what I would do and I might add here, too, that in all the flying magazines in the last couple of years there have been extended articles written on how to fly mountain country and they all cover the same general information. I know when I fly a low-powered aircraft and if it is loaded pretty heavily, I always climb on the up-wind side of the hill until I am sure I have plenty of altitude.

Q. Well, now, Mr. Acord, you say you climb on what hill now— [196] what side of the hill?

A. You climb on the windy side of the hill.

Q. Well (interrupted).

A. That gives you an updraft on the windy side of the hill.

Q. Having taken off from Paxson Lake, where could this airplane have done its climbing if it were the intention of the pilot to cross the hills on the west side of the lake?

A. Well, with the hills to the west of the lake being higher than the ones to the east of the lake, he could have probably gained a little altitude a little faster by climbing just, oh, maybe couple of hundred yards east of the lake shore where the wind slopes going up the highway, where the highway comes by. It would at least help it a little until you get to a thousand feet or so because on a warm day and in the summertime and in that elevation which is—what is it, 2,600 feet I believe that lake is, something like that (interrupted).

Q. 2,650.

Mr. Heay: 2579.

The Witness: That will make a lot of difference

(Testimony of Randall K. Acord.)

in the power output of the aircraft so you are going to need the play of all of the advantages you can to help you gain altitude or otherwise you're going to be sitting there for hours to get any altitude to get over any hills. I know my little old Luscomb when I was spraying the city [197] here for mosquitoes, I could fly over that high school building down here and had to hold my altitude at 150 feet which was what I was spraying at and my air speed was from 85 to 70 just on the other side of the school building to hold at 150 feet with the wind blowing from the west (interrupted).

Q. So there is a very considerable variation?

A. It varies according to the velocity of the wind and the shape of the terrain.

Q. Mr. Acord, are there any standards established by pilots of experience or by the C.A.A. or anyone else concerning a safe height to cross hills?

A. No, there is not. However, that is all left to the discretion of the pilot. There are set rules for instrument flight but there is none for what we call flight rules.

Q. Well, do you know what the normal practice or the normal procedure of men flying aircraft such as this use in crossing hills?

A. That is a little item that is determined by judgment of the pilot. That is up to him and it depends on his judgment as to what altitude he feels would be best to fly which would vary considerably according to the type of terrain you are going over and the velocity of the wind. Even the weather con-

(Testimony of Randall K. Acord.)

ditions—if you've got low ceiling, you are going to have to fly low which is something you don't like to do when the wind is blowing hard and when the wind is blowing [198] hard, the weather is bad.

Q. Now, in the situation which I outlined to you, is it your opinion that a reasonably prudent pilot in a similar situation would have left the lake and approached the hill on the west of Paxson Lake?

Mr. Boggess: At this time, your Honor, I will interpose an objection. Mr. Acord in a statement just made previously to this question mentioned certain other factors that a pilot would consider which haven't been discussed. I think he mentioned discernible turbulence perhaps encountered prior to his approach of the crest of the hill and also velocity of the wind. Now, in the previous hypothetical questions that have been posed, those two factors have not been covered, your Honor, and I think that we should cover them before Mr. Acord gives an opinion.

The Court: Yes, perhaps you should put those elements in the question.

Mr. McNabb: Well (pause).

The Court: Would you want that objection read again?

Mr. McNabb: Well, your Honor, as I recall the testimony of both of the witnesses who were in the aircraft at the time of the accident, they stated that they didn't know what the wind velocity was and Mr. Heay stated that when he turned south in his

(Testimony of Randall K. Acord.)

360 degree turn that [199] he had turned down-wind.

Mr. Boggess: If I recall correctly, your Honor, Mr. Heay testified that there was a 10- or 15-mile-an-hour wind at the time of the second take-off in that area.

The Court: Yes, I think so. That is my remembrance of it.

Mr. McNabb: Well, that's all right.

Mr. Boggess: And nothing to mild turbulence encountered right up until the moment (interrupted).

The Witness: Judge, may I ask a question? I wasn't in on part of this before so I don't know. Was this a second flight from Paxson over to the lake for the day—I mean, the same day?

Mr. Heay: I made an attempted take-off (interrupted).

The Witness: Oh, before?

Mr. Heay: (Continuing): ——and unloaded one passenger. This is my second attempt. This was the first take-off, second attempt.

The Court: Do you have a C.A.A. report of the wind velocity and weather condition at Gulkana?

The Witness: At the time of the accident? That C.A.A. station is something like 40 miles from Paxson and the winds at Gulkana usually coincide with what goes [200] through Isabel Pass so that information could be obtained if it would be of any information to the court.

(Testimony of Randall K. Acord.)

The Court: Do you have it in the weather bureau?

The Witness: The weather bureau can give it to you. They have that on file. They keep all those records for such purposes on back references. I don't know—all I remember about this thing is what took place in the conversations that were going on at the time of the accident. I understood the wind was from the southwest or west or west southwest so I would say that the hills being as they are through there, you could probably have a 10- to 15-mile-an-hour wind and have very mild turbulence and still have a little downdraft, but the point I would like to bring out to the court here is the old problem that the C.A.A. has been trying to determine for years, how to teach pilots how to tell the difference between an approaching stall where they are settling due to lack of speed or a downdraft. That is the thing that is—well—I guess there has been a dozen airplanes since I have been in Alaska here that have gone into hills due to that and that was one of the reasons that the articles were published in the paper by the C.A.A. They started this series of educational articles to try to help out people on things like that. But not having heard any of the other parts of this proceeding here, I would say that [201] the Gulkana wind would have quite a bearing on what the wind velocity was at the top of the hills. At least, that's my experience in flying through that country.

(Testimony of Randall K. Acord.)

Q. (By Mr. McNabb): Well, Mr. Acord, (interrupted).

Mr. Boggess: May I say something off the record at this time, your Honor?

The Court: Yes.

(An off the record discussion was had at this time.)

The Court: I think we stopped where there was an objection because there were a couple of elements that Mr. Boggess thought should be put in the hypothetical question. Do you remember what it was?

Mr. McNabb: I think we will just start from here again.

The Court: All right, we will start again from the beginning.

Q. (By Mr. McNabb): Now Mr. Acord, in your opinion should Mr. Heay as the operator of that aircraft have known the approximate direction and velocity of that wind by virtue of his place as the pilot?

A. Well, he should have known approximately the speed that he was making on the ground which would indicate whether he's got a head wind or tail wind. The amount of crab he had been [202] holding to make a course across the ground would determine whether the direction is from the right or left and if you are climbing up over a hill at a slow speed like he probably was, if he was climbing at what did you say—70 miles an hour, I believe?

(Testimony of Randall K. Acord.)

Q. That's right.

A. There isn't much safety factor left with an aircraft that stalls around 48 or something like that, whatever it stalls at. It doesn't leave much leeway for any additional performance when you get in what you might call a tight position where you need more performance because it just doesn't have it. Oh, I would say that in my opinion the troubles could have been anticipated normally. Whether these are abnormal conditions, I don't know but I mean through that country most anything is abnormal in a way. In fact, Alaska—all over Alaska, Alaska conforms to no standard laws of meteorology. All the weather in Alaska is born by terrain. Look how often the forecasters miss it. They forecast according to air masses. That gives them nothing but wind circulation but they don't take into consideration the weather that is born by that wind blowing across the terrain of Alaska which is the controlling factor. Now, I say abnormal up there. I don't mean abnormal in that particular spot or anything of that kind. Old Sig Wien taught us an awful lot about that kind of stuff. It holds true and it doesn't work in the states. [203] Pilots who have flown much time up here gradually pick that stuff up and, of course, mountain flying is similar all over.

Q. Mr. Acord, with the facts which Mr. Heay had available to him as the pilot of that plane, in your opinion was it prudent to fly only 500 feet—between 4 and 500 feet altitude, at an altitude of 4 to 500 feet over the hill while climbing to get over the crest of it?

(Testimony of Randall K. Acord.)

A. Would you clarify that a little? You mean 4 to 500 feet above the crest of the hill when he goes over?

Q. No. Four to five hundred feet above the ground climbing to get over the crest, but under the brow of the hill—he was at an altitude of between four to five hundred feet above the ground, approximately 800 to 1,000 feet from the side of the hill approaching it at a 45-degree angle, but under the brow of the hill.

Mr. Boggess: At this time, your Honor, I would like to object because I think the testimony—now which brow of which hill are you referring to, the mountain or the top of the saddle he was approaching?

Mr. McNabb: He said he was still climbing and if he had been—if he had ever reached it, he would have enough altitude to get over the hill.

Mr. Heay: Your Honor (interrupted).

The Court: Mr. Heay, you have an attorney. Do not speak up unless (interrupted). [204]

Mr. Boggess: Your Honor, this is the testimony as I recall it; that Mr. Heay had circled to an altitude of 1,000 feet over the lake prior to the time that—still in a climbing position. He turned towards a spot on the saddle being approximately 800 feet above the level of the lake, making his altitude at that time at the time he left Paxson Lake towards the saddle 200 feet higher than the saddle. That is the testimony as I recall it, your Honor.

The Court: Well, I'll overrule your objection. Of course, you have a right to (interrupted).

(Testimony of Randall K. Acord.)

Mr. Boggess: I realize that, your Honor.

The Court (Continuing): —cross-examine in the light of other facts.

The Witness: Judge, I am not on either side of this. As far as I see it, this is strictly—they just asked me up here to testify from the flying standpoint of this thing. I would say taking off to the north as they say he took off and if he did a 360 degree turn in a Super Cruiser, you won't have 800 feet to start with, not with the load that he had because it had 2 passengers and a tool box from my standpoint of the accident report.

The Court: He should have told you he took off a passenger. He couldn't get off with 2 [205] passengers and he let one off so that when he finally got off (interrupted).

The Witness: When I say two passengers, I mean a pilot and one passenger.

The Court: Oh.

The Witness: It's a two place airplane.

The Court: I see.

The Witness: And on floats, see that cuts down the performance of an airplane too unless he had hit an updraft somewhere along the line to help him get up to this 800 feet because a Super Cruiser don't have that rate of climb in a 360 degree turn with a load he had and with floats on—even wide open.

Mr. McNabb: Will you read the question which I asked?

The Court: It will take a long time to get back

(Testimony of Randall K. Acord.)

to that now. Can you remember it or can you restate it?

The Witness: I think I remember that question. He went over it twice for me before. I would say probably the average pilot would approach the hill reserving his judgment to the point that if he didn't make it or saw he couldn't make it, he could turn around and go back. That falls back in the old human element of error and falls back on the judgment of the pilot at the wheel. You have [206] to anticipate two or three miles ahead of an airplane all the time in order to fly one. Just like a car only you have to anticipate a car two or three hundred yards or less, but an airplane, you've got to stretch that further because it goes faster. So, it all falls back on the judgment of the pilot to anticipate those things and if he sees he can't make it, he can turn around and go back. If all pilots had good judgment when they get in to bad weather instead of trying to go on further they would all turn around and go back—but they don't do that—so a bunch of them get killed. How are you going to judge between individuals whose judgment is going to determine? You see what I mean? You can't rate an individual's judgment without him demonstrating it, so you would have to almost duplicate those same conditions in another airplane like it to come to a 100% sure fact of what happened. I still believe in my opinion and did at the time of the accident from what I had heard about it and so forth, I believe that the aircraft stalled

(Testimony of Randall K. Acord.)

and wasn't pulled in a downdraft because it went into the ground nose first. If he was only 4 to 5 hundred feet above the ground—when you do a stall in a small aircraft, the minimum amount of altitude loss with a safe recovery is 100 feet and sometimes it will go to 200 feet or 250 feet loss to recover from a stall. If a slight downdraft is accompanied with that stall, then you are going to lose more altitude before you can recover from it. Like [207] I said before, if he had not been in a partial stall or approaching a stall or maybe stalled, he should have hit going flat, that is, as I mentioned, pancaked into the ground.

The Court: Well, if he were starting on a stall and he turned the nose down, would that have any effect on whether he hit flat or nose down?

The Witness: Yes, it would, but normally if the hill is up in front of him, the average fellow if he is going to gain altitude in order to have more altitude, he is going to turn down that hill at the same time. It could be that it stalled so quick on him that maybe the nose dropped through or maybe he pushed the nose over. I don't know. Lots of things are done and he might not even remember himself. But you still have that tendency to get the nose down to get your speed back up and at the same time try to get that hill away from you so you will have more altitude to get it back. That's the normal reaction.

The Court: There is evidence that he did that.

The Witness: So I don't know how you're going

(Testimony of Randall K. Acord.)

to tell whether he was in a partial stall. He probably didn't recognize it himself. Most pilots don't.

Q. (By Mr. McNabb): Mr. Acord, in your opinion, would a reasonably prudent pilot under the same or similar circumstances have flown [208] that aircraft at such an altitude as to have been able to recover without striking the ground?

A. Well, that's what the C.A.A. says you are supposed to do and that is what most pilots should do. But do they do it? That's that old judgment again.

The Court: Isn't there a C.A.A. rule that says you must fly at a thousand feet?

The Witness: No, that's over populated areas only. There is no rule that is over open terrain—there is no assigned altitude under V.F.R.—visual flight rule condition. But over populated areas such as the City of Fairbanks and any other place where there is a lot of people congregated, you have got to have a thousand feet above the terrain or higher without a special waiver and I had such a waiver when I was doing all this spraying and stuff like that. That was a special permit that has to be requested through channels of the Anchorage office.

Q. (By Mr. McNabb): In your opinion, Mr. Acord, from the facts which have been outlined to you here, assuming the facts to be true as they have been outlined to you, in your opinion did Mr. Heay exercise good judgment in operating that air-

(Testimony of Randall K. Acord.)

craft as the facts which I have outlined to you indicate?

A. Well, before I answer that, I would like to go into it more, too. It is something you can't say. I mean, I have been [209] in this flying business a long time and I have had a couple little accidents myself and you hear of an accident and you say, "Well, that guy did wrong. I would have done it this way." Well, would you? How do you know if you put yourself in the same spot? Now, I know what I would have done in Doug's position due to my experience in light aircraft and so forth. I would have gained more altitude of that lake before I ever headed toward the hill, but would anybody else do it? I have had such close calls doing the same thing he has done that I have learned without getting caught, but I would say (pause)—boy, it's a rough question because you don't know unless you are under the exact same conditions because I know I would have gained more altitude before I started over it because of my past experiences, but somebody who hasn't encountered those same experiences probably would do the same thing Mr. Heay did until they learn. He probably wouldn't do it again, but that doesn't solve the problems of the court. I realize that.

Q. Well now, tell me this. Should a licensed pilot who has spent 1500 hours operating aircraft of this type in Alaska know that was improper?

A. I would say with 1500 hours of experience he would have probably some close calls similar to

(Testimony of Randall K. Acord.)

that before and he should have learned something from those which would have helped him out. But as to the question you shot at me before, it [210] puts me in an awful spot because I have never ridden with Doug. I don't know what kind of a pilot he is from my experience of riding with him and I would rather reserve the right of passing judgment on a fellow that I have never ridden with.

Q. Well now, Mr. Acord, we are not interested in Mr. Heay's ability as a pilot. That has no place in this case whatever. We are talking about that theoretically reasonably prudent pilot who is operating the same type or similar aircraft in a similar situation.

A. All pilots are taught to fly under similar and basic laws and rules. They are all taught basic laws and rules of meteorology which cover exactly these things we are talking about now. You are warned about those things in these laws and the general characteristics of meteorology and they are passed on as an education and the experience of other pilots are passed on to you as to what they have encountered under similar conditions and it's part of the pilot training. All pilots are instructed basically the same or supposed to be. The C.A.A. has tried to standardize all of that stuff. The Army standardized it first and the C.A.A. followed along second. All of that is supposed to be covered in the basic training of a pilot. Whether he exercises that as good judgment after he starts flying on his

(Testimony of Randall K. Acord.)

own is strictly up to the individual pilot. I would say that under normal conditions in flying mountainous terrain due to the training [211] that I have had and with the articles I have read and what information is available, all pilots should get a safe cruising altitude above all terrain before heading off on course or have a flat country like the Tanana Valley or something to climb over until they are at their cruising altitude to head on course. That's a general law I have always made a practice of and it has always worked and it is a law that is a custom I would say that all pilots do the same.

Mr. McNabb: That's all.

Cross-Examination

By Mr. Boggess:

Q. Now, Mr. Acord, assuming that Jess had unlimited ceiling and there existed at Paxson Lake a surface wind—that is a wind at the level of Paxson Lake—of 10 to 15 miles an hour without gusts; assuming also that the aircraft was not overloaded and the engine, a 115-horsepower engine, was in good operating condition and the pilot under those circumstances circled above Paxson Lake until he had obtained an altitude of 1,000 feet, then left Paxson Lake heading at a degree of incidence of about 45 degrees to the saddle—towards the saddle—at a point on the saddle approximately 800 feet above the level of Paxson Lake and continued his

(Testimony of Randall K. Acord.)

climb at 70 miles an hour and had experienced no prior turbulence or light turbulence at the most and stopping at that very point, [212] would that pilot in your opinion be exercising sound pilot judgment?

A. I would say under those conditions that he would have had an indication of a downdraft already because he had obtained an altitude of a thousand feet (interrupted).

Q. Now, just a moment (interrupted).

A. He was down to 800 feet which means a 200 foot loss which indicates a downdraft already.

Mr. Boggess: Would you read (interrupted).

The Witness: And still climbing.

Mr. Boggess: I am sorry, Mr. Acord. I would like to have the reporter read back my question, your Honor.

The Court: Read the question, please, Mr. Reporter.

(The question was read to the witness as follows: "Q. Now, Mr. Acord, assuming that Jess had unlimited ceiling and there existed at Paxson Lake a surface wind—that is a wind at the level of Paxson Lake—of 10 to 15 miles an hour without gusts; assuming also that the aircraft was not overloaded and the engine, a 115-horsepower engine, was in good operating condition and the pilot under those circumstances circled above Paxson Lake until he had obtained an altitude of 1,000 feet, then left Paxson Lake heading at a degree of [213] in-

(Testimony of Randall K. Acord.)

vidence of about 45 degrees to the saddle—towards the saddle—at a point on the saddle approximately 800 feet above the level of Paxson Lake and continued his climb at 70 miles an hour and had experienced no prior turbulence or light turbulence at the most and stopping at that very point, would that pilot in your opinion be exercising sound pilot judgment?’’)

The Witness: You mean he is 200 feet above the crest of the hill already?

Mr. Boggess: That’s correct.

Mr. McNabb: Now, just a minute. Your Honor, the question doesn’t state how far he was from that saddle and whether he had reached a point—where he was under the brow of the hill.

The Court: You can bring that up on your redirect.

Mr. McNabb: Very well.

The Court: Now, of course, if you can’t form an opinion from the facts as given you, you can state that.

The Witness: Under normal conditions—that is—under ideal conditions, I would say that judgment would be okay, but the things he observed from the time he took off until he was at this point should have indicated to him what the wind was, the direction it was coming from [214] and whether he might encounter downdrafts at this point over the hill.

(Testimony of Randall K. Acord.)

Q. (By Mr. Boggess): All right, Mr. Acord, I believe that what you have in mind is that this man gained an altitude too fast in a 360 degree circle, is that correct?

A. Well, you said a while ago that he climbed to an altitude of a thousand feet. Whether it was one or two or three thousand, it doesn't matter actually. I brought that up as something I caught on the question a while back. But even if he climbed over the lake up and down or anyway, as long as he was a thousand feet heading for a 800 foot hill and still climbing and if it was an absolutely calm, cool evening, I would say the man was exercising good judgment. But what are the essential factors that enter into this thing that caused the accident? That wouldn't cause an accident if there were calm air, no turbulence, no downdrafts. He would have gone right on out, but something happened.

Q. That is sufficient. Now, if you will allow me to ask you another question. Then, what if that person were caught in an abnormal high velocity vertical air current at that moment?

Mr. McNabb: I object to that question, your Honor, on the ground there has been no testimony of any abnormally (interrupted). [215]

The Witness: He is just after theory, I believe, Judge.

Q. (By Mr. Boggess): And upon encountering that vertical air current of abnormally high velocity he dropped his nose, made a turn to the left of

(Testimony of Randall K. Acord.)

about 75 to 80 degrees and headed back towards the lake, continued to fall as his plane was headed back towards the lake, kept playing with his stick trying to feel whether he had any control over the aircraft and never felt any life in his stick or very little response in the stick and crashed into the ground. Do you think that that pilot having been caught in that unusual circumstance was doing all that he could to extricate himself from it?

A. Well, here is what the C.A.A. would say and what anyone else would normally say in a case like that. If the stick is dead like you say, the aircraft is stalled regardless of whether he is in a downdraft or loss of air speed. The thing to do is get that airplane flying first. The only way to get it flying first is to put her going straight ahead. I mean, that is the way to get it flying with minimum loss of altitude. When you do a turn, the stall speed of an aircraft is increased proportionately. There is a scale given by the C.A.A. for that—which means he has got to have more speed to do the turn. Now the question comes, did he have enough altitude when he observed this [216] abnormal downdraft for example as you were giving it to gain flying speed straight ahead and then do the turn, or did he fail to use good judgment in trying to gain speed and turning at the same time? That means he would lose more altitude than if he had gone straight ahead and then do the turn. So, you see you have got more factors (interrupted).

Q. Having been caught in such a circumstance,

(Testimony of Randall K. Acord.)

would the factor that behind you was a declining slope, would that offer some inducement to attempt to turn back towards the lake, Mr. Acord?

A. Say that again.

Q. Would the fact that behind you—ahead of you is a hill or the side of a hill and behind you the hill fades away to the lake, would that factor influence you in deciding whether or not to proceed directly ahead to regain control of your aircraft or attempting to turn and start back towards the lake?

A. That depends on the altitude you are about the time when you encounter this stall or this downdraft. If you were 400 feet like you were saying here a while ago, he can do a stall and should have been able to recover and do the turn and go on down the hill and still be losing altitude in a Super Cruiser, I would say.

Q. Then it is your opinion, Mr. Acord, that what a pilot should do upon encountering a vertical air current of abnormal [217] velocity is the same thing that he should do when he encounters a stall (interrupted).

A. I'll give you a little more theory here. Normally, downdrafts never carry an aircraft into the ground. The C.A.A. has gone into a lot of research on that. It's what they call ground effect. You have air coming down in a vertical direction downward and it hits the ground and swoops out and pressure is built up between the ground and this wind moving downward. As this pressure builds up when

(Testimony of Randall K. Acord.)

the downdraft first starts, it is going to go all the way to the ground and move out a little bit, but that's only for an instant. Then there is a pressure going to build up. Then your air is going to come down and start leveling off on the top of that pressure. Follow me? Helicopters work on that principle. That's the way they get off the ground. From there one you are in what they call more or less a stable air mass condition.

Q. Uh-huh. Would you describe that as a cushion of air?

A. That's exactly what it is.

Q. Do all vertical air currents encountered, Mr. Acord, have cushions?

A. They will to a certain extent if it is on the side of a hill. Naturally, air current is going to come down on the side of the hill and it is going to pour down the side of the hill like water. That's where you get chinook winds. That's [218] where that type—that's where you get that type of wind. But there is still a certain amount of cushion effect existing there. When an aircraft takes off on the ground, there is a pressure that builds up between the wing and the ground. That pressure varies according to the height of the wing off the ground, the size of the wing, the airfoil and everything, but you can get an airplane off the ground real quick especially on a hot summer day, but you get it above that ground effect or that cushion of air and she stalls.

Q. But (interrupted).

(Testimony of Randall K. Acord.)

A. You got to go on and get a little more speed.

Q. It is true, isn't it, Mr. Acord, that some vertical air currents as you have described do not have a cushion to enable a pilot to recover short of the ground?

A. Well, I don't know. But I do know that the C.A.A. has never definitely proved that an aircraft has ever been brought to the ground by downdrafts.

Q. You said a moment ago, Mr. Acord, that you had been reading these aviation safety discussion letters from (interrupted).

A. But they are (interrupted).

Q. (Continuing): —from D. M. Gretzer?

A. But they are to indicate to the pilot that he is in a stall and not in a downdraft. That's the reason for this training article. [219]

Q. Did you ever read aviation safety discussion number 8? A. Yeah.

Q. Have you? A. I have.

Q. That contains an excerpt of a letter from Professor Ragle?

A. Yes, I know Professor Ragle.

Q. (Handing document to witness): Read over the first paragraph. Don't read it aloud. Your Honor, may we have a 10-minute recess?

A. Just a minute. May I cover this while it is fresh in my mind?

Q. All right.

A. I know Professor Ragle and I have flown with Professor Ragle and so forth and I have no—

(Testimony of Randall K. Acord.)

I mean to say this in no way of judging the fellow's pilot ability—but the same thing could have happened right here to Mr. Ragle—Professor Ragle—as happened here, but who is going to be in that airplane to determine whether Professor Ragle was in a stall or in a downdraft. We are only taking Professor Ragle's word.

Mr. Boggess: That's good enough. May we have that recess now?

The Court: Yes, ten minute recess.

(At this time, a 10-minute recess was taken and thereafter the trial of this cause was resumed.) [220]

(Mr. Randall K. Acord resumed the stand as a witness.)

The Court: Counsel ready to proceed with the trial?

Mr. McNabb: Yes, your Honor.

Mr. Boggess: Ready, your Honor. I have no further questions at this time.

The Court: Any redirect?

Mr. McNabb: Yes, your Honor.

The Court: Very well. Proceed.

Redirect Examination

By Mr. McNabb:

Q. Mr. Acord, a portion of Mr. Boggess' questions were directed to you assuming that this aircraft were being operated without any turbulence

(Testimony of Randall K. Acord.)

or without any wind and proceeding toward this hill without any turbulence or any indication of a wind at all. And he asked you at that time if the pilot showed good judgment if he had no indication of wind and the next question was if shortly thereafter he struck a downdraft of high velocity and certain things happened and now I would like to know if it is possible for a reasonably prudent pilot to fly into a high velocity downdraft without having some prior indication that there was a downdraft? [221]

A. To have a downdraft of high intensity or high velocity, there's got to be a wind blowing somewhere, from some direction and it is got to be coming over something that is higher than he is to be in it or you can have what we call vertical air masses which are not dangerous and are not hazardous but they change your cruising speed in order to hold a constant altitude such as if you are cruising along at 5,000 feet and you maintain 5,000 feet constantly and that aircraft normally cruises in a calm stable air mass of 170, you might only be doing 160 through this vertical air mass. That is caused by a slight vertical movement of the air and you are in a slight climbing position at all times—a climbing attitude at all times to maintain that constant 5,000 feet and you might think there is something wrong with the airplane. That is the only other kind of downdraft that I know of other than what we are speaking of here. To have a

(Testimony of Randall K. Acord.)

downdraft of high velocity, you have got to have a high velocity wind and it has got to be coming over an object that is higher than you are. Or, you might be a little above it and still be encountering the overwash, you understand? It is still got to be a high velocity wind. If a high velocity wind is there, you will get this high velocity downdraft and then definitely you are going to be flying in it before you get to where the downdraft is.

Q. In other words, in this particular instance then, Mr. Heay knew or in the exercise of reasonable diligence, he should [222] have known that he was approaching a mass of air where he would encounter a downdraft?

A. We just said there was a 10 to 15 mile an hour wind on the lake (interrupted).

Q. Well (interrupted).

A. After looking at the pictures and the map here and from the way they say the wind was coming which would be from the northwest—the wind direction from the northwest (interrupted).

Q. There was testimony that Mr. Heay took off from Paxson Lake to the north and at that time there was a surface wind of 10 to 15 miles an hour.

A. Yeah. Well, that—was it straight on the nose? Apparently it was from his left slightly and he was taking off the lake this way and that would—a 15 mile an hour wind will cause a slight downdraft. I would say a 15 mile an hour wind is plenty velocity to recognize that. Otherwise, I wouldn't

(Testimony of Randall K. Acord.)

have taken off to the north. I would have taken off to the south, because he took off into the wind.

Q. Well now, is it conceivable that there could be a surface wind there on the lake and no wind—or wind in an opposite direction at a thousand feet over the lake or (interrupted).

A. There has been times when the wind velocity will vary like that, but they won't vary to any great degree, and maybe [223] ten to fifteen miles an hour at the most. Areas up higher follow a general direction of flow according to air masses and air pressures.

Q. Well now, I think that in this particular instance, the testimony is that Mr. Heay was approaching this saddle as you have heard.

A. And the wind was off his right wing, is that right?

Q. That is the way as I understand it but he says he didn't know there was any wind up there and he is proceeding and there is no wind at all.

A. Well, if he had a 15 mile an hour wind on that lake (interrupted).

Q. Let us assume it was absolutely calm as he approached this hill at a thousand feet altitude and approaching the saddle at a 45 degree angle. If Mr. Heay hit such a downdraft as to force him into the ground when he had 500 feet—between 400 and 500 feet altitude over the hill, should he not be exercising reasonable diligence have noticed that there was some wind blowing and he would

(Testimony of Randall K. Acord.)

thereby have had indications that he might strike a downdraft? A. I would say yes.

Q. In other words, are you going to run right out of a dead calm area into a downdraft that throws you 500 feet into the ground?

A. Not normally. [224]

Q. Did you ever hear of a situation in which you can fly out of an absolutely calm air and right into a downdraft that will throw you 500 feet into the ground? A. No.

Mr. McNabb: That's all.

Recross-Examination

By Mr. Boggess:

Q. Now, Mr. Acord, between the level of Paxson Lake—that is, above sea level approximately 2,580 feet—and the level of the—or the peak of the highest mountain on the west shore of Paxson Lake (interrupted).

A. It's about 4,400 feet.

Q. Would you step down here, please? Which according to the "X" on—indicate on this map is 5,280 feet (interrupted). A. Okay.

Q. (Continuing): —can there be as much as a 180 degree wind shift?

A. I would say no.

Q. You would say not. High—how high would you have to go in that country to encounter a 180 degree wind shift in your opinion?

A. Well, I would say you would have to go up

(Testimony of Randall K. Acord.)

past the slope of frontal conditions to get a 180 degree wind shift. [225]

Q. In your experiences as a pilot, have you encountered a 180 degree wind shift in 25,000 feet differential in altitude?

A. Oh, definitely, but you are going to have a little trouble getting a Super Cruiser to 25,000 feet. But what I'm getting at is you won't encounter a 180 degree wind shift at a thousand feet, not south of the Brooks Range.

Q. Now, assuming that Mr. Heay was approaching the saddle in a climbing attitude, having left the shore of Paxson Lake at an altitude above it of 1,000 feet; assuming that the direction indicated—direction of the wind as indicated on Paxson Lake remained the same as he climbed and assuming that he felt no gusts or turbulence in the wind, is it not possible under those conditions for him to have encountered without sufficient prior warning a vertical wind of such velocity as to push him into the ground?

A. Gentlemen, there is nothing going to sit up there and honk a horn for you when there's a down-draft up ahead of you. That falls back on human judgment—pilot judgment. If he took off to the north, he took off into the wind. The wind apparently was from the north or he wouldn't have taken off to the north like you have said. If there is a northwest wind blowing or whatever it happens to be and if there is mountains between you and the direction the wind is coming from, it is normal

(Testimony of Randall K. Acord.)

to assume that there is downdrafts there of some kind but the intensity will depend on the velocity of [226] the wind and the shape of the terrain. You can get downdrafts without turbulence as I said before. It depends on the smoothness of the hills and so forth.

Q. Would it be normal to assume, Mr. Acord, that you would encounter a downdraft of the intensity described under those circumstances?

A. I would say no because apparently he lost what, a thousand feet or so? No, I'll take that back. He was above the surface of the lake how much, a couple hundred feet? And from where the crash was over to the surface of the lake (interrupted).

Mr. Boggess: That's something that has not been testified to, your Honor, the distance from the shore line.

The Witness: He had to fall 5, 6, 7 hundred feet. Downdrafts of that intensity are not known in that type of terrain, that I know of, at least I have never encountered it.

Q. (By Mr. Boggess): Just a few more questions, Mr. Acord. Have you flown over that particular saddle which we have reference to?

A. Yes, I have.

Q. And how many times have you flown over that saddle?

A. Oh, I don't know, two or three times. I mean, I have circled all around that country. [227]

(Testimony of Randall K. Acord.)

Q. What attitude—what altitude did you clear that saddle when you flew over it?

A. Oh, gosh, it varied each time. Anywhere from 2, 3 hundred feet on up, but that was in different type aircraft.

Q. Well then, you have never flown over that saddle in a Piper Super Cruiser aircraft?

A. No, I haven't.

Mr. Boggess: That's all.

Mr. McNabb: That's all.

The Court: Just a minute. I want to ask you something. Suppose this pilot took off to the north and there was a wind blowing to the south, blowing right at him, 15 miles an hour; he takes off and he makes a turn of 180 degrees and comes back and going down wind—down south, that would put the wind back of him, wouldn't it?

The Witness: Yes, sir.

The Court: Then he cuts over to the right at an angle of 45 degrees to the hill and he gets over towards the hill side, the wind if it is still coming in the same direction would be an updraft, wouldn't it, instead of a downdraft?

The Witness: No, sir, because the wind is coming from the north. We speak of where the wind is coming from all the time.

The Court: Yes. [228]

The Witness: If he is taking off to the north into the wind, the wind is from the north and he is taking off into it.

The Court: Yes.

(Testimony of Randall K. Acord.)

The Witness: Then he does a 180 degree turn and starts south and he's got a tail wind.

The Court: Yes.

The Witness: Then he turns right 45 degrees?

The Court: Yes.

The Witness: And then back up here is a 5200 foot mountain between him and the wind, right?

The Court: Yes.

The Witness: Then you got a downdraft coming right over the mountain.

The Court: I don't think that mountain—I think the wind—you see it is 45 degrees. He is coming into it at a 45 degree angle between his course and the hills.

The Witness: Well, sir, then it doesn't make any difference what direction you're going as long as the mountain is between you and the wind. If you're going straight toward the mountain and the wind is coming over, you're going to have the same thing as any other angle because that wouldn't—because that downdraft is on the leeward side of the [229] mountain. The angle has no effect as to the downdraft itself. However, he was going at a 45 degree angle which would be an assistance to him to drop the nose and turn left and go on down the hill in case anything would happen, but it would still indicate that there is a downdraft on the south side of that mountain when the wind is from the north regardless of what angle he is approaching it.

The Court: All right.

(Testimony of Randall K. Acord.)

Mr. McNabb: Your Honor, I was going to show Mr. Acord this photograph and likewise show it to the court. Perhaps it will assist both of you in this particular discussion.

The Court: All right.

Mr. McNabb: Randy, is—this is the mountain which is marked “X” on this map.

The Witness: That’s the 5,200 foot hill.

Mr. McNabb: That’s correct, and as we have discovered, the wind was coming from the north evidently. We can’t tell whether it was directly out of the north or not but at any rate, Mr. Heay turned, made a 180 degree turn or perhaps something less because when he reached the end of the lake he didn’t turn 180 degrees. He made a 360 degree turn but then there is some doubt on whether he made the complete circle. Now, still that wind is coming down this [230] general direction all around this 5,200 foot peak which is shown there and the ink spot on the photograph represents the general vicinity of the crash.

The Witness: So apparently, the mountain is between him and the direction of the wind, is that correct?

Mr. McNabb: That’s the way I would see it. And I think, your Honor, by examining the photograph (interrupted).

The Court: Very well.

(Document handed to court.)

The Witness: That photograph, Judge, the way

it is pictured there, is looking to the northwest across the lake.

Mr. McNabb: Your Honor, do you have any further questions of this witness?

The Court: No, that's all.

Mr. McNabb: That's all, I guess, Randy.

The Court: I guess that's all.

Mr. Boggess: I have no further questions.

The Court: That's all then.

(At this time, Mr. Randall K. Acord left the witness stand.)

Mr. McNabb: I call Mr. Freericks at this time, your Honor. [231]

CHARLES JAMES FREERICKS

called as a witness in behalf of the Plaintiffs, having been first duly sworn, testified as follows:

Direct Examination

By Mr. McNabb:

Q. Will you state your name, please?

A. Charles James Freericks.

Q. Where do you reside, Mr. Freericks?

A. Here in Fairbanks.

Q. By whom are you employed?

A. Civil Aeronautics Administration.

Q. Are you acquainted with Mr. Heay, the defendant? A. Yes.

Q. Are you acquainted with Dean Phillips, one of the plaintiffs in this case? A. Yes, I am.

Q. Are you familiar with the airplane crash of

(Testimony of Charles James Freericks.)

the plane belonging to Mr. Phillips last year at Paxson Lake? A. Yes.

Q. Did you have any discussion with Mr. Phillips concerning that airplane crash?

A. On several different occasions.

Q. Did you have any discussion with Mr. Phillips concerning the motor of that airplane?

A. Yes. [232]

Q. Do you recall the first time that you discussed with Mr. Phillips after the crash the motor?

A. No, I don't, not the first time.

Q. Do you recall how soon after the crash that you discussed with Mr. Phillips the motor in that plane? A. No, I don't.

Q. Do you know whether the motor was ever removed from that airplane?

A. Yes, I removed it.

Q. Was anyone else with you when you removed it? A. Yes, Louie Frank.

Q. How long after the crash did you remove that motor, Mr. Freericks?

A. Not too long. I am not sure just how many days had elapsed. I would say a week, something like that.

Q. Was it any more than a week?

A. Gee, I am not sure.

Q. Was it less than a week or would you say it was 7 days? A. I am not sure.

Q. You think it was approximately a week?

(Testimony of Charles James Freericks.)

A. Seems like that. That's about the time it could be, I think.

Q. Now then, how does it happen that you went for the motor, Mr. Freericks?

A. Well, it was possible there might be some salvage, [233] something that could be used and Louie Frank decided to go up and see if there was.

Q. Did you go for that motor at someone's request?

A. No. I volunteered. Louie Frank wanted to see the airplane and the engine to see if it—if there was salvage and I said that I would go with him to look the airplane over and if there was any salvage, I would help him.

Q. Do you know whether Mr. Phillips requested Mr. Frank or yourself to go for that motor?

A. No, I don't.

Q. Well, do you know whether Mr. Kelly requested you to go down and get that motor?

A. No, I don't.

Q. Who took the motor out of the plane?

A. Louie Frank and myself.

Q. Did Mr. Gray ask you to go down and get that motor?

A. No, he didn't. No one asked me. I volunteered.

Q. Do you know whether they asked Mr. Frank to go and get it? A. No, I don't.

Q. Did you have any authorization to take the motor away from the plane?

A. None whatsoever.

Q. You didn't request from Mr. Phillips, Mr.

(Testimony of Charles James Freericks.)

Gray or Mr. Kelly the privilege of removing the motor from the plane? [234]

A. No, I did not. I went up to assist Louie Frank to remove the engine. I assumed that he had received permission from someone,

Q. Do you know whether he had or not?

A. No, I am not sure.

Q. Did he—did you talk to Mr. Frank about whether he had any conversation with any of the parties that I have just mentioned concerning the motor? A. Well, I didn't witness any.

Q. I say, did you talk to Mr. Frank to ask him if he had requested any of these men permission to get that motor? A. No, I did not.

Q. Did he say whether he had talked to Mr. Heay about it or not?

A. I'm—I don't think I ever asked him if he did but I was under the impression that he had discussed it with Mr. Heay.

Q. Had you ever talked to him—to Mr. Heay about getting the motor out of the plane?

A. Yes, I think I did. I mentioned the fact that I was going up with Louie to get the engine.

Q. And (interrupted).

A. If it was salvagable.

Q. And what did Mr. Heay say to that?

A. He said he thought it was a good deal if it was [235] salvagable. It would be useful to someone.

Q. Do you know whether Mr. Heay told Mr. Frank to get the engine or not?

(Testimony of Charles James Freericks.)

A. Well, I don't know that for sure, no. I feel assured that he had discussed it with Mr. Heay before going up after the engine.

Q. Do you know whether Mr. Frank asked Mr. Phillips, Mr. Gray or Mr. Kelly about going after it? A. No, I don't.

Q. Didn't discuss that with Mr. Frank at all?

A. No, I didn't.

Q. He didn't say anything to you about it, about asking any of the parties plaintiff to this suit about going after the motor?

A. Not to my knowledge.

Q. So it is your impression then that you went up for that motor at the request of Mr. Heay—that Mr. Frank went after the motor and you just assisted him? A. That's correct.

Q. At the request of Mr. Heay?

A. Well, not myself. Louie Frank, yes.

Q. Did you get the motor? A. Yes.

Q. Did you bring it back to Fairbanks?

A. Yes, I did. [236]

Q. Do you know what was done with the motor after it came back? A. I am not sure, no.

Q. You don't know what was done with it after that?

A. No. At the time, why it was taken off the truck at Doug's place, at Doug's house and after that I don't know what became of the engine.

Mr. McNabb: That's all.

Mr. Bogges: I have no questions, your Honor.

(At this time, Mr. Freericks left the witness stand.)

Mr. McNabb: At this time, your Honor, my other witness has not put in an appearance and therefore I have no alternative other than to rest. However, I do not by that wish to waive any rights that I may have to call Mr. Heay on rebuttal.

The Court: Very well. Call your next witness then.

Mr. Boggess: A mere technicality, your Honor, but Mr. Heay was examined on direct examination by plaintiff and he was excused temporarily while other witnesses were called and he did not resume the witness stand. So, I would like to cross-examine Mr. Heay at this time.

The Court: Yes. You didn't get a [237] chance to cross-examine.

Mr. Boggess: I did not have the opportunity.

The Court: Very well, you may.

(At this time, Mr. Douglas Heay, the defendant, resumed the witness stand and testified as follows:)

DOUGLAS HEAY

Cross-Examination

By Mr. Boggess:

Q. Doug, how often have you flown in the Paxson Lake area?

A. Well, quite often in the last four years. I would say that I have taken off from Paxson Lake

(Testimony of Douglas Heay.)

at least 50 times and from Paxson Lodge strip oh, four, five times that I know of on wheels.

Q. Now, those 40 or 50 take-offs were during the period of four years, is that correct?

A. Yes, I believe so.

Q. And would you just—would you be able to estimate the number of times you had landed and took off from Paxson Lake during the month of September in the fall of the year?

A. Well, in 1950 I would say at least 8 or 10 times. In 1949 probably 30 times.

Q. You—would you take off and land at Paxson quite often? I mean, if you went up there once, would you go to surrounding lakes in that [238] vicinity?

A. I would land at Paxson and go straight to the Tangle Lakes or go straight from here to the Tangle Lakes and maybe from Paxson shuttle into the Tangles or Swede Lake or Landmark Lake. There are a lot of those lakes lying back in the hills there.

Q. And leaving and approaching Paxson, what was your normal route of approach and (interrupted).

A. Well, if I were using Sportsman's Lodge as a base and I took off south, I would take off and immediately swing over the ridge there.

Q. By the ridge, do you mean the saddle?

A. The saddle there.

Q. On the west side of the lake?

A. Right.

(Testimony of Douglas Heay.)

Q. At what altitudes would you say you have flown across that saddle from time to time?

Mr. McNabb: Your Honor, I object to the question as not bearing on the issues in this case and not material as to what he did on previous or prior occasions.

Mr. Boggess: Only in this particular, your Honor. As Mr. Acord, plaintiffs' witness, stated, these matters are largely pilot judgment and certainly the past experience of this pilot in the particular area where an accident occurred would give him some indication as to what he should be (interrupted). [239]

The Court: Objection overruled.

The Witness: Well, on the southerly take-off, I have taken off and swung across the saddle and on northerly take-offs, usually I will swing almost as far as Paxson Lodge and come back, having gained my altitude and swing across the ridge. I have flown over that identical spot where I stacked up this time quite a few times.

Q. And at what altitudes (interrupted).

A. That (interrupted).

Q. (Continuing): —have you flown over there?

A. It varied—at varying altitudes, both returning and leaving Paxson Lake.

Q. What was the minimum altitude you have flown over the (interrupted).

A. Well (interrupted).

Q. (Continuing): —saddle?

(Testimony of Douglas Heay.)

A. I couldn't swear to that.

Q. If you know.

A. Well, I don't know. Usually when you're flying in those—in that part of the country unless you're on a long flight and steady course at high altitudes, you're watching where you're going rather than your instruments, other than your oil gauges.

Q. From your experience, Doug, would you be able to state generally at what range of altitudes, giving the minimum altitudes and the maximum altitudes, that you have crossed the [240] saddle?

Mr. McNabb: Well now, just a minute. He stated—the maximum has no place in this case and the minimum, he just stated he didn't know. I therefore object to the question.

Mr. Boggess: Your Honor, the maximum would have some bearing on this case because in making a determination at what altitude to cross the saddle, any turbulence that he might have experienced at higher altitudes that exceeded the turbulence that he experienced near the ground, would tend to make him choose the lower flight across the saddle.

The Court: All right. Objection overruled.

Mr. McNabb: There hasn't been any testimony that he found any turbulence at any altitude, your Honor.

Mr. Boggess: I am trying to lay the foundation for that.

Mr. McNabb: Well then, ask him.

The Court: I have overruled the objection.

(Testimony of Douglas Heay.)

The Witness: The highest I have possibly flown across that saddle was 2,000 feet above the saddle. That was on trips where I have been expecting another ship [241] on wheels to be waiting at Paxson Lodge for me or my wife to meet me at the Sportsman's Lodge and I have come in from Fairbanks heading for the Tangles and I go via Paxson Lake and maintain the altitude I used getting from Paxson over the summit and if I didn't see the plane or my wife in the car at Sportsman's Lodge, I would swing right on over and go into the Tangles without even making an approach to Paxson Lake and I would say 2,000 feet is about the highest I have ever gone across that particular saddle.

Q. (By Mr. Boggess): Is there any way at all, Doug, that you can estimate what the lowest altitude is that you have flown across that saddle?

A. Well, maybe I have—I might have gone as low as 100 feet at times as far as that goes.

Q. From those experiences of flying across the saddle between the altitudes that you have stated, have you observed that the air in any particular—at any particular altitude is more turbulent than the air at other altitudes?

A. I could not honestly say I had across that particular saddle.

Q. Have you ever experienced any severe turbulence in that area? A. Yes, I have.

Q. Was that severe turbulence associated with any other type of weather phenomena that you noted at the time? [242]

(Testimony of Douglas Heay.)

A. Usually extreme winds.

Q. Have you ever, when extreme winds were blowing, encountered a downdraft which—of the nature which you have previously described in that vicinity?

A. No. In all my flying up here, I don't believe I have encountered quite a downdraft that that was.

Q. Now, what was your destination that day?

A. My destination was a little lake just off the MacLaren River.

Q. Is that lake on this map?

A. I don't believe it is. It might. It shows two small lakes.

Mr. McNabb: Your Honor, I don't think his destination is material to this matter.

The Court: What is the materiality of it?

Mr. Boggess: The materiality of his destination, your Honor, is that there has been some testimony today that the most careful or cautious thinking pilot would do his flight to the windward of the mountains. Now, it is my contention that a pilot in mapping his flight plan takes more into consideration than what is the safest route. It is also the question of what is the quickest, most convenient route and one that will save the most fuel and yet not necessarily subject the aircraft to any undue [243] risk.

Mr. McNabb: Your Honor, the testimony was that if he wanted to go over on the other side of that hill where there was an updraft, he could have gained his altitude there, but it has nothing

(Testimony of Douglas Heay.)

to do with where he is going. He says he made one complete circle around the lake.

The Court: Well, objection overruled.

Q. (By Mr. Boggess): Would you mark with "D" your destination on that map? Now, Mr. Heay, will you step back down here? According to the terrain appearing on this map, if you had decided to fly to the windward of the mountainous area depicted thereon, what would your route have been between Paxson Lake and your destination?

Mr. McNabb: Your Honor, I think that question is not material to the issues involved in this case by any stretch of the imagination.

The Court: Objection sustained.

Mr. Boggess: I have no further questions at this time.

Redirect Examination

By Mr. McNabb:

Q. Doug, you recall that **downdraft** you testified to in which you lost 1200 feet?

A. Yes, right around Rainbow Mountain. [244]

Q. What kind of an airplane were you flying that day? A. Taylor Craft.

Q. Is that smaller than this one? A. Yes.

Q. How much smaller?

A. Well, it's two place rather than three and it has 65 horse Continental.

Q. You had 115 here? A. Right.

Q. This downdraft which you hit on the day of

(Testimony of Douglas Heay.)

the crash was more extreme than the one which you hit in the Taylor Craft?

A. I surely believe so.

Mr. McNabb: That's all.

Recross-Examination

By Mr. Boggess:

Q. Just a minute Doug. This prior accident that has been mentioned (interrupted).

A. What accident?

Q. Didn't you mention an accident?

A. No.

Mr. Boggess: Will the reporter read what he said?

Mr. McNabb: Re-read what he said. [245]

(All the questions and answers asked and given under redirect examination of the witness were read by the reporter.)

Mr. Boggess: No further questions, your Honor.
The Court: That's all, then.

(Mr. Douglas Heay left the witness stand.)

Mr. Boggess: I have to go out here, your Honor, and see if I have a witness.

Mr. McNabb: It's time for a recess, Bill, and (interrupted).

The Court: No, we will go ahead.

CHARLES JAMES FREERICKS

called as a witness in behalf of the Defendant, having been previously sworn, testified as follows:

Direct Examination

By Mr. Boggess:

Q. Where were you working last September, Jim? A. At Week's Tower.

Q. What kind of shift do you work at Week's?

A. Well, it varies.

Q. What time—what kind of a shift were you working last September? [246]

A. I am not sure. I think I was working around the clock at that time, different shifts and alternating every week.

Q. Do you recall any conversation having taken place in the tower in your presence and in the presence of Doug Heay and in the presence of Dean Phillips? A. Yes.

Mr. McNabb: Now, just a minute.

Q. (By Mr. Boggess): Concerning (interrupted).

Mr. McNabb: Just a minute. Go ahead.

Q. (By Mr. Boggess): Concerning the borrowing of a Piper Super Cruiser aircraft belonging to Dean Phillips? A. Yes.

Q. Approximately when did that conversation take—occur, if you recall?

A. The day of the month?

Q. Yes. A. I don't recall.

Q. Do you recall the accident that occurred at

(Testimony of Charles James Freericks.)

Paxson Lodge when Doug Heay crashed into the ground with Phillips' aircraft? A. Yes.

Q. Did that conversation occur on that [247] day? A. No, the day before that.

Q. Was there anyone else present at that time besides the persons I have named?

A. Did you mention Walt Bear?

Q. I didn't.

A. I think that Walt Bear was present, but I am not sure.

Q. What did Doug Heay say and what did Dean Phillips say if you recall with respect to borrowing of an aircraft?

A. Well, I recall that Doug wanted to use the airplane to shuttle I guess Jess Bachner and Ernie Hubbard back and forth so that they could fix this 170 they had previously—that had previously been damaged.

Q. And what aircraft did Doug say that he wished to borrow?

A. Dean's Super Cruiser.

Q. And did Dean at that time tell Doug that he would (interrupted).

Mr. McNabb: Now, I object to any leading questions.

The Court: Objection sustained.

Q. (By Mr. Boggess): What then did Dean say if anything in response to Doug's request to borrow the aircraft?

A. Well, Dean said that he could use the airplane. However at that time he said that he needed

(Testimony of Charles James Freericks.)

an airplane to get a moose or something that had been shot some place and he [248] had to ferry with this—he wanted the Fairbanks Air Service to ferry it back and forth to get this meat out, whatever it was he was going to get—and that if Doug would take care of that bill, well that he could use Dean's airplane.

Q. Now, did you make—would you state whether or not you visited Doug Heay's home on the evening of the accident? A. Yes.

Q. And what was the occasion of your visit?

A. Well, let's see. I was residing there at the time.

Q. You were? And was—would you state whether or not Mrs. Heay was home?

A. Yes, she was there.

Q. While you were present in Doug Heay's home, did Dean Phillips come to his home?

A. Yes.

Q. Would you state generally what was discussed in your presence at that time?

Mr. McNabb: Now, there is no proper foundation for that question, your Honor. I object to it.

Mr. Boggess: I will withdraw the question.

Q. (By Mr. Boggess): Was the value of the wrecked aircraft discussed at any time while you were present there at Doug Heay's home? [249]

A. Yes.

Q. If you recall, how did the subject of the value of the wrecked aircraft come up?

A. I don't recall.

(Testimony of Charles James Freericks.)

Q. If you recall, did Dean Phillips at any time state what the value of the aircraft was?

A. Yes. He stated that the value of the aircraft was \$3,000.

Q. While you were present, did Dean Phillips break—make any breakdown to show how he arrived at that figure? A. Not to my knowledge.

Q. While you were present, did Doug Heay make any promises to pay Dean \$3,000?

A. No.

Mr. McNabb: I object to that and move that the answer be stricken on the ground that it would be a conclusion.

The Court: Objection overruled.

Mr. Boggess: No further questions.

Cross-Examination

By Mr. McNabb:

Q. Did—what—you were present all the time that Dean was in the room with Doug?

A. Yes, I was. [250]

Q. You were in the same room with them all the time? A. Yes.

Q. Heard all their conversation?

A. I don't remember all of it.

Q. You probably don't remember all of it?

A. No. I don't have any reason to remember all of it. I was there during the conversation.

Q. Now, did—do you have any recollection at all of what Doug said when Dean said the plane was worth \$3,000?

(Testimony of Charles James Freericks.)

A. Yes. He didn't say anything right at the time. A short time later he said that that's a lot of money.

Q. He didn't say that that's a reasonable price?

A. No.

Q. Didn't say anything else?

A. Not to my knowledge.

Q. Now, is it possible that some time later during the conversation that he might have said something else in reference to that price and you wouldn't now recall it? A. Say that again.

Q. I say, is it possible that some time—at a later time during that evening—that Doug could have said something in reference to this price and you not now recall what he said?

A. It's possible.

Mr. McNabb: I think that's all. [251]

Redirect Examination

By Mr. Boggess:

Q. Were you still at Doug Heay's home when Phillips left? A. Yes.

Mr. Boggess: No further questions.

(At this time, Mr. Freericks left the witness stand.)

Mr. Boggess: Your Honor, I had understood that—from counsel and I think he will verify me on this, that he was going to take most of the day, if not all day, in the presentation of his case. Now, I have two witnesses, one Professor Ragle who is

out at the University, and he is busy today and I would call him today and notify him when to appear. I could have him here at ten o'clock, and then the other one is Mr. Hubbard, an eyewitness to the airplane accident. I can get him up here immediately after Mr. Ragle and probably finish with the defendant by tomorrow noon, and if that would be satisfactory, to continue the case at this time.

Mr. McNabb: Your Honor, it is quite true what Mr. Boggess said. In fact, the matter is I told him I would be quite sure I would require all day today. So, it is entirely my fault he doesn't have his witnesses here.

The Court: Very well, then. We will [252] recess until tomorrow at ten o'clock.

The Clerk: Court is recessed until tomorrow morning at ten o'clock.

(At 4:10 p.m. o'clock, the trial of this cause was recessed until 10:00 a.m. May 10th, 1951.)

Be It Remembered, that upon the 10th day of May, 1951, the trial of this cause was resumed, plaintiffs and defendant represented by counsel, the Honorable Harry E. Pratt, District Judge, presiding.

The Court: Counsel ready to proceed with the trial of the case of Phillips versus Heay?

Mr. Boggess: Ready, your Honor. I would like to call for my first witness Mr. Hubbard.

ERNEST HUBBARD

called as a witness in behalf of the Defendant, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Boggess:

Q. Would you state your name, please?

A. Ernest Hubbard.

Q. And where do you reside, Mr. Hubbard?

A. At 821 - 4th Avenue in Fairbanks.

Q. How long have you resided in the Territory of Alaska? [253]

A. Since the fall of 1937.

Q. What is your present occupation?

A. Well, I am engaged in the airplane business in the freighting business between the States and Alaska.

Q. What is the nature of your interest in that business?

A. I am a third owner in the enterprise. I own a third of the business.

Q. What enterprise is that, Mr. Hubbard?

A. It's Arctic Pacific, Inc.

Q. How long have you had an interest in that business? A. Since 1947, August.

Q. Do you hold any ratings from the Civil Aeronautics Administration?

A. Yes, I do. I am a licensed airplane and engine mechanic. The license (interrupted).

Q. When did you first obtain a license from the Civil Aeronautics Administration?

(Testimony of Ernest Hubbard.)

A. In 1934.

Q. Has that license been intact since that date?

A. Yes, it has.

Q. Did you have any association with the aircraft business prior to 1934?

A. Yes, I did. I have been in the aircraft business continuously since 1928.

Q. Have you had any experience as a flight mechanic? [254]

A. Yes, I have.

Q. Have you ever been a licensed pilot, Mr. Hubbard?

A. I was licensed in the last part of 1934 or possibly it might be early '35. I obtained a student permit and did continue on with my training and flew for some little time. As a matter of fact, I flew until 1937 without carrying it any further.

Q. Now, in your business—in your association with the aircraft business, have you flown on many occasions in light planes as a passenger?

A. Yes, I have; many times.

Q. Would you have any idea of how many hours you had flown in light aircraft as a passenger?

A. It would be hard to estimate accurately. I would say however not less than five to six hundred hours in very light aircraft.

Q. Mr. Hubbard, were you in the vicinity of Paxson Lake on the 20th day of September, 1950?

A. Yes, I was.

Q. What was your occasion for being there, Mr. Hubbard?

A. I had gone to Paxson Lake and another lake

(Testimony of Ernest Hubbard.)

in the near vicinity for the purpose of repairing a damaged airplane and preparing it for ferrying back to Fairbanks.

Q. Were you at Paxson Lake when the defendant, Douglas Heay, had an accident with an aircraft belonging to Dean [255] Phillips, Charles Gray and James Kelly? A. I was.

Q. Did you witness that accident?

A. I did.

Q. Would you step down here just a minute, Mr. Hubbard? Could you mark approximately on this map the vantage point from which you witnessed that accident? (Witness complied with request.) Just a moment, would you mark that with the letter "W"? And is that the Sportsman's Lodge?

A. Yes, it was Sportman's Lodge.

Q. Had you attempted to take off from Paxson Lake with the defendant, Douglas Heay, prior to the accident?

A. Yes, we had attempted to take off.

Q. Would you describe what conditions you observed with respect to wind at that particular time?

A. When we made up our mind to take off, the wind was from the south at about probably 10 to 15 miles an hour. However by the time we had warmed up the airplane and were ready for actual takeoff, the wind had died and we had a calm. Since float airplanes don't perform too well in a dead calm the little ship didn't want to get on the step and we, rather than punish the engine any more, turned around and taxied back to the Sportsman's Lodge

(Testimony of Ernest Hubbard.)

and I got out of the airplane. However, by the time we had returned to the Sportsman's Lodge, the wind had shifted 180 degrees. It was then coming from [256] the north at about the same velocity that it had originally been from the south, so we had a complete 180-degree wind change. I feel that if I had stayed in the airplane, it would have taken off without trouble.

Mr. Parrish: We object to that as being voluntary, your Honor, and not responsive to the question.

The Court: Yes.

The Witness: Sorry.

The Court: Just designate which part you wish (interrupted).

Mr. Parrish: That portion as to how he felt, your Honor.

The Court: May be stricken.

Q. (By Mr. Boggess): After you got out of the aircraft, Ernie, what did you do then?

A. Simply stood there and talked with my friends and watched the takeoff.

Q. Would you state whether or not you observed the takeoff of the defendant, his complete flight and the accident?

A. Yes, I did from the beginning to the end.

Q. If so, would you describe exactly what you observed with respect to takeoff, departure and accident?

A. Well, the airplane took off in a northerly direction [257] towards the north end of the lake, circled, made a 180-degree turn after climbing a

(Testimony of Ernest Hubbard.)

short period of time, climbed back in a southerly direction, passed my point of view, again made a 180-degree turn and flew north, at which time he having made apparently sufficient altitude to cross the ridge (interrupted).

Mr. Parrish: Now, we object to that portion of the answer and move it be stricken.

The Court: May be stricken. Just tell what you saw.

The Witness: About over the north end of the lake, the airplane made a left turn and headed in a westerly direction—I would say a southwesterly direction, and upon approaching the opposite shore of the lake or over the opposite shore of the lake, I suddenly noticed that the airplane had apparently lost all lift and was diving straight down to the ground in which position it did hit. However, before it started this dive, I observed the airplane making a left turn and it struck the ground headed towards the lake.

Q. (By Mr. Boggess): Approximately — from your position, if you know, or if you were able to estimate, approximately how far above the level of Paxson Lake was the aircraft when it departed from the shores of Paxson Lake?

Mr. Parrish: We object, your Honor, [258] as being without a foundation. He's asking—assuming a foundation in the question. We don't know whether the man could estimate it or not.

The Court: Objection overruled.

(Testimony of Ernest Hubbard.)

The Witness: I would estimate the airplane to be not less than 1,000 feet above the lake.

Q. (By Mr. Boggess): From your position, could you observe whether or not the aircraft was higher than the crest of the saddle towards which it was pointing?

A. Yes, I could very well and it was higher.

Q. If you observed, what was the attitude of the airplane as it approached the crest?

A. It approached the crest in a normal flying attitude, climbing somewhat.

Q. Do you have an opinion, Mr. Hubbard, of how far the aircraft was from the ground below it vertically at the point where it commenced its turn?

Mr. Parrish: Just answer yes or no, please.

The Witness: Yes.

Q. (By Mr. Boggess): If so, would you state that opinion?

Mr. Parrish: We object, your Honor, as being without a foundation; nothing to show he is able to [259] estimate how far he was above the ground.

The Court: Motion denied—objection overruled.

Q. (By Mr. Boggess): Go ahead.

A. I estimate the airplane to be not less than five to six hundred feet above the ground at the point where the trouble developed.

Q. Did you observe the condition of the weather as to visibility and ceiling at the time of the accident?

A. Yes, I did.

Q. Would you state what that condition was?

A. The weather—visibility and ceiling were un-

(Testimony of Ernest Hubbard.)

limited. There may have been a few very high clouds. By very high, I mean way above all the surrounding terrain.

Q. Would you state whether or not you observed the aircraft from the moment it commenced its descent until the moment it struck the ground?

A. Yes, I did.

Q. Did you in observing that aircraft approaching the ground notice any movement of the wings or any spinning tendency on the part of the aircraft?

A. No, none at all. It descended what appeared to be to me nearly vertical and at all times I could see the complete top of the wing. It struck the ground in that attitude as [260] far as I could see. There were a few little spruce trees. They went behind them. They couldn't be very high.

Q. And on which side of the lake was your vantage point with respect to the place where the accident occurred?

A. I was across the lake from the accident. I was on the east side of the lake.

Q. And you stated previously that the aircraft was pointed down towards the lake in its descent?

A. That is right.

Q. Would that be in line with your line of vision at that time?

A. Yes, almost directly.

Mr. Boggess: I have no further questions.

(Testimony of Ernest Hubbard.)

Cross-Examination

By Mr. Parrish:

Q. Mr. Hubbard, how long have you known Mr. Heay?

A. I believe since the summer of 1947.

Q. How did you become acquainted with him?

A. I don't recall the exact circumstances.

Q. Are you — would you say you were well acquainted with him or acquainted with him just as a general acquaintance or are you a good friend of his? How would you describe your [261] acquaintance?

A. I am not entirely sure I know what you mean. I would say we were good friends.

Q. How often do you see Mr. Heay?

A. Oh, every day or two.

Q. And is your wife and Mrs. Heay—are your wife and Mrs. Heay good friends?

A. I wouldn't say they were intimate friends. They are friends. They're friendly.

Q. Do they visit back and forth with each other and do you all go to each others' houses?

A. Well, we have on rather rare occasions.

Q. When did you first talk to Mr. Heay about this accident?

A. Well, I talked to him about it some directly after the accident, however, not much for the next few days until he recovered from some of his injuries.

Q. Now, did he say what caused the accident?

(Testimony of Ernest Hubbard.)

A. I believe he probably did. I don't exactly recall the conversation at the time.

Q. Well, now, what time was it?

A. Any discussion I think we had about the accident would have been after he returned to Fairbanks, which would be about 3 or 4 days after the accident.

Q. Well, do you remember what he said was the cause of it? Do you remember the substance of his conversation as to what caused it? [262]

A. No, I don't. I can't say that I recall specifically any of the words at that particular time.

Q. That wasn't my question. My question was do you recall the substance of his conversation as to what caused the accident? A. No.

Q. You testified just a minute ago that he did tell you the cause of the accident.

Mr. Boggess: I will object to that, your Honor. There is no testimony in the record from this witness that Douglas Heay did tell him the cause of the accident.

Mr. Parrish: I will ask that the record be read.

The Court: We don't have time to read it, Mr. Parrish.

Mr. Parrish: I believe that was one of his first answers that he had talked with him concerning the cause of the accident. (To Witness): Now, you are under oath, sir. The record is there.

Mr. Boggess: Now, wait a minute. There's no indication that the witness isn't cognizant of the fact that he is under oath or that he has made any

(Testimony of Ernest Hubbard.)

attempt to evade or not to answer your questions truthfully. It's not (interrupted). [263]

The Court: It is contrary to court rule for counsel to have disputes between themselves. If you have anything to say, address it to the court.

Mr. Boggess: I stand corrected.

The Court: I beg your pardon?

Mr. Boggess: I stand corrected.

Q. (By Mr. Parrish): Now, if—did you have any conversations then with Mr. Heay concerning the cause of this accident at any time after the accident?

A. I have had conversations with him about it after the accident, yes.

Q. Do you know when and where they were?

A. I would assume that—I don't know exactly.

Q. Do you remember that there were conversations as to the cause of the accident?

A. Yes, I do.

Q. Now, did he tell you what caused the accident?

A. He told me at one time or another—I can't say exactly when—that he had been caught in a downdraft.

Q. That was what he thought caused the accident then?

A. That's correct. That's what he told me he thought caused the accident.

Q. Now, you have never flown as a pilot in Alaska? A. No, officially I have not. [264]

(Testimony of Ernest Hubbard.)

Q. You have no log record of flying in Alaska as a pilot?

A. That's correct. I have not logged the time.

Q. But you are a licensed mechanic?

A. That's correct.

Q. And why did you go down to Paxson Lake now?

A. I went to Paxson Lake for the purpose of repairing and preparing for ferrying back to Fairbanks a damaged aircraft.

Q. Now, what aircraft was that?

A. The aircraft was a Cessna 170 belonging to Mr. Malloy.

Q. Where was it?

A. It was on the lake approximately 50 miles to the southwest—mostly west—of Paxson Lake.

Q. And who hired you to go over and repair that aircraft?

A. I wasn't hired. I did that as a (interrupted).

Q. Favor? A. As a favor, yes.

Mr. Boggess: I object to any further inquiry along these lines. It doesn't have any relevancy as far as the issues of the complaint and answer are concerned.

The Court: Objection will be overruled.

Q. (By Mr. Parrish): Did you go down to help Mr. Heay? A. Yes.

Q. Free of charge? [265] A. Yes.

Q. Because you were good friends?

A. Yes.

Q. Now, I believe you testified you saw this

(Testimony of Ernest Hubbard.)

crash. As I understood your testimony, the takeoff originally was—or the takeoff was northeast along the lake? A. That was correct.

Q. Now, how far were you from where the plane actually took off the water?

A. It's hard to estimate accurately.

Q. You don't know just exactly how far you were from the point of takeoff then when it took off? A. That would be awfully hard to say.

Q. And you are positive now that there was a complete, almost a complete 360-degree turn made in two 180-degree turns and—a 180-degree turn and then another turn before the plane lined out on its flight?

A. Would you repeat that again, please?

Q. You are positive that the plane made almost a complete 360-degree circle before it lined out on its flight across the pass?

A. It made a 360-degree circle, but not exactly as you have described it, I don't think.

Q. Well now, if you remember it distinctly, just will you state once more how that plane took [266] off?

A. It took off towards the north, northerly direction on the lake, and made a 180-degree turn and (interrupted).

Q. To the west?

A. To the west and proceeded southerly (interrupted).

Q. For about how far?

A. In a climbing attitude—I would say offhand

(Testimony of Ernest Hubbard.)

not less than a mile and possibly a mile and a half.

Q. Then what did he do?

A. He made another turn, 180 degrees, and headed back north.

Q. Then what happened?

A. After reaching what I estimate to be approximately the end of the lake, the north end of the lake, he again turned to a southwesterly direction and proceeded towards the west side of the lake.

Q. How far did he come back up the lake before he turned into the southwesterly direction?

A. He didn't exactly come back up the lake. You mean a southerly direction?

Q. No, when he came back north—yeah, south. Yes, excuse me.

A. (Pause.) Oh, I would say he probably came as much as a mile before he actually crossed over from the (interrupted).

Q. He didn't come back quite as far as he went north? A. That's correct.

Q. Did he get out over the trees or did he turn across the [267] lake when he made his turn into the west?

A. From my vantage point, I believe he crossed the water.

Q. You could be mistaken on that?

A. I could be all right, since I had no particular reason to carefully observe the same at the time.

Q. How far in your opinion over the water was he? How far from the end of the lake? How close to you? You were between—the plane was between

(Testimony of Ernest Hubbard.)

you and the end of the lake, was it not, when it turned southwest?

A. That's correct, however, not in exactly a straight line, you understand.

Q. Now, how far on your side of the edge of the lake was the plane when it turned southwest?

A. He was not on my side. He would be (interrupted).

Q. Let me ask you this way. How far was he from the south end of the lake when he turned southwest?

A. I would estimate that he was about at the end of the lake.

Q. About at the end of the lake? How far were you from the plane when you made that estimation?

A. I believe that would be about 2 miles, possibly two and a half.

Q. Do you believe your estimation would be accurate within a couple hundred feet, being 2 miles away?

A. Couple hundred feet and two miles? I would question that. [268]

Q. Well, likewise if you judged this plane to be 500 or 600 feet off the ground from a distance of over 2 miles, would you say it is possible—would you say there is a possibility of your being off at least 200 feet?

A. Not as much since I know that ridge across there to be somewhere between 700 and 800 feet high at that point and he was between that ridge

(Testimony of Ernest Hubbard.)

enough so I would have something to compare my height by.

Q. Now, if you were here (pointing to map) and this represented Paxson Lake and this represents the high hill and this represents the ridge (pause), if you were here, would you place the plane here (indicating)? Would you place the plane here or would you place the plane up in here where you could see across the ridge?

A. I think the drawing isn't exactly accurate. Say again what you consider to be the lake itself.

Q. This (pointing).

A. Well (interrupted).

Q. Now, the point I'm trying to make is from this graphic representation, was this plane backed by the hill or the nose of the hill or was the plane backed by sky?

A. No, it was backed by the hill.

Q. By the hill from where you were standing?

A. Correct.

Q. Now, could you then tell how far this plane was from the back of the hill from where you were standing? [269]

A. The large hill?

Q. Yes.

A. No, since it wasn't very close proximity to that large hill, that would be hard to do.

Q. And then, how would you tell how high it was from the ground?

A. Because of the shoulder of that ridge. That is a continuation on a part of that hill.

(Testimony of Ernest Hubbard.)

Q. Well, if the hill was behind the plane, you mentally drew a line then from the ridge underneath the plane to fix its height?

A. The drawing isn't exactly correct there. The lines of this saddle or ridge which you have do extend further north than they are indicated there. Therefore, there is a brow or edge to the ridge even though it would be between the lake and the high hill. Do I make myself clear?

Q. When you looked at the plane, was it backed by the hill or by the sky? A. By the hill.

Q. And you believe then that over two miles you can judge its height with relation to the hill within 200 feet? A. Yes, I do.

Q. And yet you can't judge the distance of the height of the plane off the end of the lake within 200 feet?

A. I might have if I had it impressed on my mind that hard. [270]

Q. Now, were you continually observing the flight of the plane? A. Yes, I was.

Q. It never left your vision?

A. That's correct.

Q. When the plane reached—started to settle, what happened?

A. I saw the airplane make a nose-down left turn towards the lake.

Q. How did it settle?

A. As near as I could see from my position, vertically or nearly so.

Q. Just as if there were a weight on it?

(Testimony of Ernest Hubbard.)

A. Nose first—a diving attitude.

Q. Let's straighten this out. The plane was flying a climbing attitude? A. Correct.

Q. Then what happened?

A. The nose dropped and the left-hand turn was made. The airplane then proceeded to—right to the ground in a nose-down diving attitude.

Q. Did the turn happen simultaneously with the dive?

A. I think the turn was started just about the same time the nose was dropped.

Q. Did you see anything unusual the flight of the plane [271] up to that time? A. No.

Q. Did it appear to be losing altitude?

A. No.

Q. Did it appear to be stalled? A. No.

Q. Was it to your appearances riding normally until the nose suddenly went down and the left turn was made? A. Yes, it was.

Q. Then from where you were, you couldn't tell whether the plane was settling or not, losing altitude? A. Do you mean before or after?

Q. Before the flight—before the crash.

A. Before the crash or before (interrupted).

Q. Before the turn.

A. Before the turn? It wasn't settling before the turn. If so, it would have to be almost so close to them that no one would be able to determine that.

Q. Did it appear to be maintaining flying speed?

A. Yes, it did.

Q. And it was in a climbing attitude?

(Testimony of Ernest Hubbard.)

A. Yes, mild.

Q. Did you state how high the plane was above the ground at the time the turn was made?

A. I estimated it to be not less than 500 to 600 feet. [272]

Q. You could have been off a little bit in either direction?

A. If anything, I would have—it would have been a little higher, if anything.

Q. A little higher? You don't know anything about how much time it would take a plane—how much height it would take to turn that light plane like that under normal conditions, do you?

A. How much height it would take to (interrupted).

Q. To turn a plane of that size under normal conditions if it was maintaining flying speed?

A. It shouldn't take any height. I mean, it shouldn't lose or gain any altitude in normal flight.

Q. Well, from your position on the lake then, what would cause the plane to suddenly turn nose down and crash?

A. Only thing I can account for it would be a very strong vertical current of air.

Q. That's the only thing you can think of?

A. That's the only thing I can think of.

Q. Could it have been that the pilot felt he couldn't make it over the ridge and started to turn back to the lake and went into a dive?

A. I think that's practically impossible.

Q. Why do you say that?

(Testimony of Ernest Hubbard.)

A. I observed the airplane to be above the ridge, flying in a normal manner and no mechanical trouble that I could [273] determine. The engine was running fine.

Q. It was maintaining flying speed?

A. Maintaining flying speed.

Q. And it was maintaining flying—maintaining altitude? A. Maintaining altitude.

Q. And the motor was working all right?

A. The motor was working fine.

Q. Why would the pilot turn?

A. If he should encounter a very strong vertical current which tended to carry him towards the ground (interrupted).

Q. But you said he wasn't being carried towards the ground. A. Before the turn was made.

Q. Yes. But why would he turn if he wasn't being carried toward the ground?

A. If he should start to be carried toward the ground, that would be his immediate reaction.

Q. But I didn't ask you that. I said you testified that he wasn't being carried toward the ground. He was maintaining altitude. You saw it.

A. That's correct. He was maintaining altitude up to the point (interrupted).

Q. He was maintaining flying speed?

A. That's correct.

Q. And he was in a climbing attitude?

A. A mild climbing attitude. [274]

Q. And although you were under the plane look-

(Testimony of Ernest Hubbard.)

ing up, you think he had sufficient altitude to go over the ridge? A. Yes.

Q. You weren't level with him, were you?

A. No.

Q. You couldn't tell just exactly how high he was, could you? A. In reference to what?

Q. I mean off the ground because you were looking up at him.

A. Not directly at a very great angle.

Q. And you were 2 miles away.

A. Approximately.

Q. It is possible that he was settling and that is the reason he made his turn, isn't it?

A. He would have to start settling (interrupted).

Q. But you testified he didn't.

A. I testified that I didn't see him start.

Q. But you saw the plane all the time.

A. I saw the plane all the time from 2 miles away.

Q. Then you are familiar with how fast light travels, aren't you? You are familiar with how long it takes you to see anything from 2 miles?

A. That's correct.

Q. And you testified he didn't settle before the turn. [275]

A. I will not say that he didn't settle any. As a matter of fact, 6 inches almost would give him the feel that something is wrong and at 2 miles, 6 inches isn't much.

Q. But you testified that he was maintaining climbing flying speed and was climbing?

(Testimony of Ernest Hubbard.)

A. Correct.

Q. Then he couldn't settle, could he?

A. He could if a very strong vertical current hit him. He could very suddenly start settling.

Q. But you testified that wasn't the case as you saw it.

A. I think you misunderstand.

Q. Well now, was he maintaining flying speed?

A. He was maintaining flying speed up to the time the trouble commenced.

Q. Was he maintaining a climbing attitude?

A. A mild climbing attitude.

Q. Was he losing altitude?

A. He wouldn't lose altitude in a climb.

Q. It is your testimony he wasn't losing altitude?

A. Up until the moment the trouble started.

Q. You never saw him losing altitude?

A. I saw him lose altitude (interrupted).

Q. Now, just a minute. Did you—before the turn, did you see him lose altitude before the turn?

A. I did not. [276]

Q. Now, you weren't on a level plane with this plane, were you?

A. No, I was not.

Q. You were looking up at him?

A. Yes.

Q. Now, will you tell me how you could tell that it was above the saddle?

A. Because I can see enough light way underneath the airplane to see across the top of the saddle by a large margin.

Q. But I thought you said the plane was between you and the big hill?

A. Of course.

(Testimony of Ernest Hubbard.)

Q. And how could you see the light between the plane and the saddle?

A. There has to be light (interrupted).

Q. No, I mean between the plane and the saddle?

A. Well, that saddle is very readily apparent. You can see that the same as you can see the airplane.

Q. Does the saddle run between the hill and yourself?

A. Oh, yes, it does.

Q. It isn't the same saddle that connects the hill then?

A. It isn't the saddle. I'm sorry. I have mis-spoken myself. I did not mean the saddle. It is the brow of the hill as extending from the saddle.

Q. Will you state as near as you can estimate how far you [277] were from the plane at the time it made the turn and crashed?

A. I would estimate from a mile and a half to two miles.

Q. Was it closer than it had been when it was at the end of the lake?

A. Yes, I believe it might be a little closer than the end of the lake.

Q. Did you see the plane that day? Did you see the plane that day?

A. Did I see the plane that day?

Q. After the crash?

A. No, I did not.

Q. Now, let me ask you. From the time the plane took off and headed north, I believe you testified he travelled about a mile and a half north?

(Testimony of Ernest Hubbard.)

A. Do you mean before his first turn back to the south?

Q. Let me review this. The plane took off to the south, is that correct?

A. No, the plane took off to the north.

Q. The plane took off to the north and he made a 180 degree turn to the left?

A. I believe it was to the left.

Q. And headed south for a mile and a half?

A. Approximately I would say.

Q. About how long did it take the plane to accomplish this?

A. Well, I don't know. I didn't time it. I had no reason [278] to even consider the time.

Q. Do you know the cruising speed on the plane?

A. The cruising speed?

Q. Flying at under full power in its attitude, about how fast would it have been flying?

A. If he were climbing at a normal rate, it would probably indicate about 70 miles an hour.

Q. And then he made another turn to the left?

A. I couldn't exactly say for sure that that turn from the southerly direction to the northerly direction was to the left or to the right but he did make a 180 degree turn and go back to the north.

Q. Yes. And he was still climbing?

A. Still climbing.

Q. And flew about a mile?

A. Flew to the end of the lake about from my vantage point and as I remember it.

(Testimony of Ernest Hubbard.)

Q. Well, it was a mile and a half down from where he made his turn? The first turn—he took off to the north and made a turn and flew back down south a mile and a half.

A. Approximately.

Q. Then I believe you testified he flew back a mile?

A. A mile? No.

Q. And turned across the lake?

A. No, I think you misunderstand. He flew north again [279] until I now estimate him to have been over the north end of Paxson Lake.

Q. How far was that?

A. Offhand I had estimated it about 2 or 2½ miles.

Q. Now, if he was flying at about a mile a minute airspeed and he climbed 200 feet a minute, what would be his normal rate of climb?

A. Well, that would depend on the pilot and what his intentions were. It could be anywhere from 50 feet a minute with that airplane. I suppose the maximum would be at that altitude I don't think over 500 or 600 feet a minute at best.

Q. How high was he over the end of the lake?

A. That would be hard to say. There is nothing at the end of the lake to judge altitude by.

Q. You don't know?

A. I hadn't given it any thought and wouldn't be able to say accurately or estimate it because of a lack of something to compare by.

Q. You couldn't compare it with the hill on the left?

A. Too far away.

(Testimony of Ernest Hubbard.)

The Court: I think we better have a recess at this time until a quarter past.

(At this time, a short recess was taken and thereafter the trial of this cause was resumed.)

The Court: Counsel ready to continue [280] this case?

Mr. Parrish: Ready, your Honor.

Mr. Boggess: We're ready, your Honor.

(Mr. Ernest Hubbard resumed the witness stand.)

Mr. Parrish: We have no further questions.

Redirect Examination

By Mr. Boggess:

Q. Ernie, you stated on direct examination that you estimated the altitude of the aircraft in flight to be approximately 1,000 feet above the level of the lake—Paxson Lake. At what point in the aircraft's flight did you make that estimation?

A. I would make that estimation as the aircraft approached the bluff on the far side of the lake. It was the only thing I had or know of in the vicinity where I know the height. I know the height of that bluff. Therefore, I could compare the altitude of the airplane with the known altitude of that bluff.

Q. In which direction was the plane flying then when you made that observation?

A. It was flying in a southwesterly direction.

Q. And if you know, approximately how far was

(Testimony of Ernest Hubbard.)

it on that [281] course from the westerly shore of Paxson Lake?

A. (Pause): It would be between a quarter and a half a mile probably.

Q. And at that point in the aircraft's flight, were you able to see day light between the top of the crest of the saddle and the airplane?

A. I was able to see under the aircraft and over the top of the bluff that forms the saddle, yes.

Mr. Boggess: No further questions.

Recross-Examination

By Mr. Parrish:

Q. How high is this bluff on the far side?

A. It is between 700 and 800 feet I believe.

Q. Is that the saddle?

A. The saddle is within a few feet of the same altitude, yes.

Q. How far was the airplane from the bluff when you made that estimation?

A. I estimate it to be from a quarter to a half a mile and probably close to a half from the lake shore. Therefore, it couldn't have been over say a quarter of a mile from the edge of the bluff probably. That is estimated.

Q. And how far were you from the airplane at that time?

A. Mile and a half to two miles. Probably closer to mile [282] and a half.

(Testimony of Ernest Hubbard.)

Q. Now, did you make all of these estimations at the time of the accident?

A. No. I am very familiar with that country and have been for several years and I know the hills pretty well and I can estimate in my mind somewhere within reason and I did walk across that—up that bluff and I have an idea from that.

Q. You are making these estimations now then from what you remember two years ago or a year ago last September? A. Some of them.

Q. And you didn't make them at the time? You didn't make any estimations at or about the time of the accident then?

A. Only as to the altitude of the airplane as I remember it.

Mr. Parrish: That's all.

Mr. Boggess: That's all, Ernie.

(At this time, Mr. Ernest Hubbard left the witness stand.)

Mr. Boggess: I would like to call Professor Ragle.

RICHARD CHARLES RAGLE

called as a witness in behalf of the Defendant, having been first duly sworn, testified as [283] follows:

Direct Examination

By Mr. Boggess:

Q. Would you state your name please?

A. Richard Charles Ragle.

(Testimony of Richard Charles Ragle.)

Q. And where do you reside, Mr. Ragle?

A. I resided—I reside at 910 Cowles Street in Fairbanks.

Q. And how long have you resided in the Territory of Alaska?

A. Continuous except for the years '45 and '46 since 1938.

Q. And was—what is your profession, Doctor?

A. The present time professor of geology at the University of Alaska.

Q. And what degree or degrees do you hold in the field of geology?

Mr. Parrish: We object now as being incompetent, irrelevant and immaterial as to what degrees he holds in geology.

Mr. Boggess: Geology, if the court please, is a study of the earth and the study of all factors affecting the earth. It is a very broad field and includes some phases of meteorology.

The Court: Objection overruled.

The Witness: I hold the degrees of bachelor and masters in geology.

Q. (By Mr. Boggess): And where did you obtain your study? [284]

A. My study was at Colorado College in Colorado Springs and Colorado University at Boulder, Colorado.

Q. Would you describe please generally what is included in the study of geology?

A. The study of geology is the application of chemical, physical and mathematical principles to

(Testimony of Richard Charles Ragle.)

the study of the earth which includes the atmosphere, the outer crust of the earth and the interior of the earth.

Q. Other than the studies of meteorology contained in your study of geology, have you had any other training in the field of meteorology?

Mr. Parrish: We object, your Honor. He has not testified he had any training in meteorology.

The Court: Objection will be overruled.

The Witness: Instruction in meteorology and aerodynamics for the dynamics of air movement in the United States Air Forces flying school in the study of climatology and study in the preparation for teaching the subject of meteorology and the subject of theory of flight and aerodynamics.

Q. (By Mr. Boggess): Are you a licensed pilot, Professor Ragle? A. I am.

Q. And when did you first obtain a license to fly?

A. First obtained a commercial license in [285] 1931.

Q. Had you obtained any license prior to the commercial license? A. None.

Q. Are you still a licensed commercial pilot?

A. I am.

Q. When did you commence your flight training, Professor Ragle? A. In October, 1930.

Q. And where was that?

A. That was at the Army Air Force Training Center, March Field, California.

Mr. Parrish: We will admit his qualifications as a pilot, your Honor.

(Testimony of Richard Charles Ragle.)

The Court: However, you are not required to accept his admission. You may show all of your qualifications if you like.

Q. (By Mr. Boggess): Are you familiar with what layman call light aircraft, Professor Ragle?

A. I am.

Q. Since you commenced flying in 1931 until this date, how many hours would you estimate that you have logged in piloting of light aircraft?

Mr. Parrish: We object to that unless it is more specific. I have no objection to his [286] estimating his log hours but what does he mean by light aircraft?

Q. (By Mr. Boggess): All right. Professor Ragle, what do you—how do you define the term “light aircraft”?

A. I think light aircraft are generally conceded to be those aircraft which are not sufficiently large to be used for commercial air transportation. That might include various different horse power categories. Generally it would be single engine and four place or smaller.

Q. Have you had experience, Professor Ragle, in the piloting of aircraft having horse power ranges of from 85 to 115 horse? A. I have.

Q. Would you be able to state approximately how many hours you have piloted aircraft within that category?

A. It would be in excess of 2,000.

Q. Were—did you have any connections, Pro-

(Testimony of Richard Charles Ragle.)

fessor Ragle, with the Air Forces during the last war?

A. I was on duty from October, 1941, through November, 1946.

Q. And what were your duties during that period?

A. The duties were varied. Engineering for cold weather testing and development; engineering for the lend lease processing of aircraft to Russia at Ladd Field, Officer in Charge of accident investigation and Search, Rescue and Survival for the Air Transport Command in Alaska; and Chief of [287] the Search, Rescue and Survival Section of Headquarters, Air Transport Command and Chief of Staff for Operations for the Air Rescue Service, Army Air Forces.

Q. Have you ever had any experience, Professor Ragle, in instruction in the operation of aircraft having single engine—aircraft having horse power range of from 85 to 115 horse power?

A. I have.

Q. And would you state the extent of your experiences as an instructor or the nature of your experiences as an instructor?

A. During the period 1939 through to October, 1941, I was coordinator and operator of Civil Pilot Training Program for the University of Alaska and operator of the flying school that gave the flight instruction to university students.

Q. Did you do any actual instruction yourself, Professor Ragle?

A. Yes, I did.

(Testimony of Richard Charles Ragle.)

Q. The last time you observed your log books—have you kept your log books up to date, Professor Ragle? A. I have not.

Q. How many total hours—when was the last time that you kept an active log?

A. The last time that I was engaged in the air transport industry and maintained a continuous log was in the summer of [288] 1947.

Q. Have you maintained any log since then?

A. I have logged some of them since then, but the log books are not up to date.

Q. From your recollection of the hours contained in those log books as of the last time that you regularly kept them and from your estimation of the number of hours flown since, what would you state was your total hours in operating aircraft of all types?

A. The figure would be approximately 4,600 hours.

Q. Now, Professor Ragle, are you familiar with Paxson Lake and the terrain in the immediate vicinity of Paxson Lake? A. I am.

Q. Have you ever flown (interrupted).

A. I have.

Q. (Continuing): —there? How many times would you state you have flown in the vicinity of Paxson Lake—immediate vicinity of Paxson Lake?

A. Probably not less than 20 times.

Q. Are you familiar, Professor Ragle, with the terrain within an area of 10 miles immediately west of Paxson Lake? A. I am.

(Testimony of Richard Charles Ragle.)

Q. Are you familiar with—I'll strike that question. Would you step down here a minute, Professor Ragle? Are you familiar with the contour of the peak indicated by the mark [289] "X" on this map?

A. I don't think I could answer that question directly. I see the contours on the map and I recognize the area involved.

Q. You will observe a blue line drawn between a point marked "X" on the map and a point marked double "X" on the map. That line indicated the crest of a saddle immediately west of Paxson Lake. Are you familiar with that saddle?

A. I am familiar with the area you are designating, yes.

Q. Now, Professor, Ragle, from your experiences as a pilot, would you describe the various techniques of take off and departure from a lake—from a lake in mountainous terrain such as you encounter in the vicinity of Paxson Lake?

Mr. Parrish: We object to it, your Honor as being incompetent, irrelevant and immaterial.

The Court: Objection sustained.

Q. (By Mr. Boggess): Now, are you familiar generally with the winds found in mountainous terrain?

Mr. Parrish: We object to that as being incompetent, irrelevant and immaterial.

Q. (By Mr. Boggess): Particularly the surface winds.

(Testimony of Richard Charles Ragle.)

Mr. Parrish: Same objection.

The Court: Particularly what?

Mr. Boggess: The surface winds. [290]

The Court: What was that, Mr. Reporter?

Court Reporter: The surface winds.

The Court: I think you should limit it right to the terrain in question.

Q. (By Mr. Boggess): Are you familiar with the nature of the surface winds at Paxson Lake generally as to their stability or variability?

A. (Pause.)

Mr. Parrish: He just asked you if you were familiar with it.

Q. (By Mr. Boggess): Just say yes or no.

A. I think your question is too broad to be answered.

Q. I see. Have you had an opportunity to observe, Professor Ragle, the tendencies, if such exist, for the wind to shift at the level of Paxson Lake at Paxson Lake?

Mr. Parrish: Now we object, your Honor, as being leading and suggestive. I think again that question is too broad. I am not sure whether he is just asking him whether he had a chance to observe or whether he knew.

Mr. Boggess: No, I had asked him whether he had had an opportunity to observe.

Mr. Parrish: Then I have no objection. [291]

The Witness: I have had, yes.

Q. (By Mr. Boggess): And would you state then what you observed (interrupted).

(Testimony of Richard Charles Ragle.)

Mr. Parrish: Now— go ahead and finish your question. I thought you had.

Q. (By Mr. Boggess, continuing): As to the condition of surface winds at Paxson Lake with respect to shift and variability?

Mr. Parrish: We object, your Honor, to his answering that question unless he shows what chance he's had to observe; laying a foundation for this answer.

Mr. Boggess: He's already testified, your Honor, that he has been in the vicinity of Paxson Lake at least 20 times.

Mr. Parrish: That hasn't got anything to do with whether he had a chance (interrupted).

Mr. Boggess: Also, your Honor, he is a geologist and meteorologist and an experienced pilot.

The Court: It seems to me you should go right to the point. Give him a hypothetical question showing the facts which you claim involved and see if he can take those facts and give you a conclusion as to results from—therefrom.

Mr. Boggess: Well, I didn't want [292] to go into this matter so abruptly, but at the court's suggestion, I will.

The Court: Very well.

Q. (By Mr. Boggess): Assuming these conditions to exist at Paxson Lake: ceiling unlimited, visibility unlimited and wind at the surface of Paxson Lake from a northerly direction having velocity from 10 to 15 miles an hour, a wind which has shifted to that direction from the south approxi-

(Testimony of Richard Charles Ragle.)

mately a 180 degree wind shift in the course of 20 to 25 minutes; assuming that a pilot in a Piper Super Cruiser aircraft having an engine of 115 horse power and carrying one passenger takes off to the north into the surface wind, climbs over the lake to an altitude of approximately 1,000 feet over the lake's surface and encountering at the most mild turbulence in his flight to altitude, departs from the northerly shore of the lake heading for a point on the crest of the saddle approximately 200 feet lower than his altitude, heads into this crest at an angle of incidence were he to meet it of 45 degrees in a climbing attitude and air speed of 70 miles, maintaining at least 500 feet altitude over the terrain vertically below him and being at least 1,000 feet out from the nearest terrain to him horizontally and stopping there, in your opinion, would that pilot under those circumstances be exercising sound pilot judgment? [293]

Mr. Parrish: We object to this question on several grounds, your Honor. In the first place, it doesn't take into consideration several important factors. One, that when this pilot turned into toward the saddle, he noticed a difference in ground speed and felt wind. This pilot testified to that. It will appear in the record (interrupted).

Mr. Boggess: It will not.

Mr. Parrish: He noticed a difference in the ground speed. Now, secondly, that he—in fact the words, your Honor, that he stated and we went into them two or three times are that—just a mo-

(Testimony of Richard Charles Ragle.)

ment. This won't take me just a second. He stated going south with the wind—I have it here in just a second. I will come back to it, your Honor, rather than take time. I have a note on it here what he said. Secondly, it doesn't take into consideration that it is up to the court to determine whether or not the man acted with due care or not. The question that—counsel is entitled to ask by his hypothetical question what in his opinion caused the accident. That this witness might be able to answer and then if he asks this witness how would he avoid the accident and how do you avoid those accidents, then the court can decide whether he acted with due care and if they want to show it is the practice to fly within 500 feet of the ground on the dumb side of the hill, that's still a matter of [294] fact, but it is taking the question of negligence away from the court and I don't think the witness is entitled to answer that.

Mr. Boggess: I would like to be heard on that latter point, your Honor.

The Court: Well, it seems to me that you should go on and give him the whole circumstance. You have got your plane only partly up to the dangerous point. You should give him then what happened. Give him the whole story.

Mr. Boggess: The reason, your Honor, that I have brought the plane only to the present point is because there is some suggestion in the evidence stemming from the use of their expert witness, Mr. Acord, that this pilot exercised poor pilot judgment

(Testimony of Richard Charles Ragle.)

prior to the time that he was caught in the condition which caused the crash.

The Court: That's correct. I remember that. Very well. The objection will be overruled.

Q. (By Mr. Boggess): You may answer the question. If you wish it read back (interrupted).

The Court: Do you remember the last question, Professor?

The Witness: Yes, I remember the question. I think again it is so broad and general that an [295] answer would be difficult to give.

The Court: Well, proceed then, Mr. Boggess:

The Witness: If (interrupted).

Mr. Parrish: I object to volunteering. He stated he couldn't answer.

The Court: Proceed with it then.

Q. (By Mr. Boggess): Professor Ragle, what other factors do you consider important in an answer to this sort of question that you would need to consider in order to arrive to an opinion as to what is considered sound pilot judgment?

Mr. Parrish: We object to that question, your Honor. That amounts to volunteer statements on the part of the witness.

Mr. Boggess: I am only asking the witness for factors, your Honor. I am not asking him if he (interrupted).

Mr. Parrish: You asked him—you're asking him to state the question that you're going to ask him.

The Court: Just a minute. As I pointed out,

(Testimony of Richard Charles Ragle.)

counsel should not indulge in discussions with one another.

Mr. Parrish: I am sorry. [296]

Mr. Boggess: I apologize.

The Court: I think you should give him the whole facts and then get his opinion. That is authorized by law and you can go into detail on side issues later.

Q. (By Mr. Boggess): The facts are as follows Professor Ragle; assuming that the facts are as follows, Professor Ragle (interrupted).

The Court: Start from where you left off and go on from there.

Mr. Boggess: Do you wish me to go on from the point that I left the airplane suspended in the air?

The Court: Yes, yes, and give him the whole story.

Mr. Boggess: All right.

Q. (By Mr. Boggess): Then the pilot continued to proceed towards the crest of the saddle in a climbing attitude, maintaining an air speed of 70 miles an hour; suddenly he observed the rise of the horizon in front of him; immediately he turned left—made a lefthand turn, dropping his nose, maintaining his throttle at their climb position and started back down the slope towards the westerly shore of Paxson Lake; as he descended he kept playing with his stick and he felt no life in the stick or little life in the stick; he maintained—he continued to [297] do this trying to feel whether his plane—the surfaces of his wing and so forth were taking hold;

(Testimony of Richard Charles Ragle.)

continued to play with the stick; it had no life and it was sluggish, until he struck the ground in a nose down attitude—he came in to the ground nose down. Now assuming those facts to be true, Professor Ragle, would that pilot, in your opinion, be exercising sound pilot judgment?

Mr. Parrish: We object on the same grounds, your Honor. Not all the facts are here and it doesn't take into consideration the wind testified to by the pilot himself and doesn't take into consideration when the nose was pulled down or when the turn was made and (interrupted).

The Court: You can take those points up on cross-examination. So, I will overrule the objection.

Mr. Parrish: I can't cross-examine this witness on them.

The Court: I beg your pardon?

Mr. Parrish: I don't think I can cross-examine this witness, your Honor. He just said he didn't know anything except what (interrupted).

The Court: Your objection is overruled. You may answer. Proceed with your answer, Professor.

The Witness: Assuming the facts as you stated them, I would find nothing wrong with the [298] pilot's technique.

Q. (By Mr. Boggess): The question I asked you Professor Ragle was whether or not, in your opinion, the pilot had used sound pilot judgment.

Mr. Parrish: We object to that answer, your Honor. It doesn't say when he exercised sound pilot judgment.

(Testimony of Richard Charles Ragle.)

The Court: I think the witness has already answered your question and answered it directly.

Mr. Boggess: Your Honor, I would like to have a ruling at this time from the court whether I am going to be permitted to get this witness' opinion as to whether or not the defendant exercised good sound pilot judgment prior to the time that he encountered what (interrupted).

Mr. Parrish: Now, just a minute. Your Honor, that isn't the question, and this witness has been outside and never heard anything about it and I think he is telling him what caused the accident.

Mr. Boggess: I said as this defendant testified, your Honor.

The Court: Your witness has answered your question. I think he saw nothing to complain of in the pilot's action.

Mr. Boggess: I have no further [299] questions.

Cross-Examination

By Mr. Parrish:

Q. What do you mean by you found nothing wrong with his technique?

A. All of the operations necessary to fly the aircraft, manipulation of controls, the choice of approach, reaction as he got in trouble, technique, all of those processes required in manipulating the aircraft.

Q. What are the causes of a crash of an aircraft? What causes an airplane to fall out of the air and strike the ground?

(Testimony of Richard Charles Ragle.)

A. I am afraid the question is too broad to be answered.

Q. Let me ask you this: Can anything other than pilot error or mechanical or functional failure of the aircraft cause it to strike the ground?

A. Yes.

Q. What?

A. A source of a number of accidents has been the movement of the air masses itself.

Q. Then it is your contention that air mass can push a plane right out of the air and cause it to strike the ground?

A. No.

Q. What is your contention? [300]

A. An aircraft is a vehicle that is operating in a tenuous fluid body and all of the movements of that body are imposed on the aircraft as long as it remains in that body, whether the movements are horizontal or vertical. They are a factor of the total movement of the aircraft itself.

Q. Now, that isn't what I asked you. I asked what is—is it your contention that air masses can cause a plane to crash?

A. I am sorry. That's not the way you asked the question.

Q. Well, I will ask you that now.

A. And the answer to that specific question must be yes.

Q. Air masses can cause a plane to crash?

A. Definitely.

Q. Now, under what circumstances will air masses cause airplanes to crash?

(Testimony of Richard Charles Ragle.)

A. There are a number of circumstances.

Q. Let me change my question so we don't waste too much time. Is it your opinion that in this case under the facts that Mr. Boggess gave you that an air mass caused this plane to crash or can you make a statement as to what caused the plane to crash?

A. Under the facts as they have been given to me, it would appear that only one possibility existed (interrupted).

Q. Wait just a minute. The facts as they have been given to you on the witness stand here? [301]

A. On the witness stand, today.

Q. Go ahead.

A. Yes. Only one possibility exists and that that the aircraft was in a downward moving air mass moving with velocity in excess of the maximum rate of climb of the aircraft.

Q. Now, you are familiar with that country over there? A. I am.

Q. And you are familiar with that particular dome and saddle? A. That's right.

Q. Now in your opinion, Mr. Ragle, what caused—just a minute—in your opinion if this pilot flew within 500 feet of the dumb side of the hill, 500 feet of the ground, and was caught in an air mass, is there any pilot error in such a move?

A. No.

Q. There is no pilot error to fly within 500 feet of the ground on the dumb side of the hill?

A. It is necessary moving from point to point.

(Testimony of Richard Charles Ragle.)

Q. Now, was the—is it necessary over Paxson Lake?

A. Yes. Paxson Lake is practically surrounded by hills and in order to depart from or approach it, you must fly on the down side. As you have said, of hilly country and within 500 feet of the ground (interrupted).

Q. I mean at the place where the plane crashed here. Is [302] it necessary to fly within 500 feet of the ground? A. Obviously not.

Q. Do you regard it as safe now? Do you regard it as safe to fly within 500 feet of the ground on the leese side of that hill?

A. Under the circumstances recorded here (interrupted).

Q. But do you regard it as safe?

A. Your question is too broad to be answered.

Q. Let me ask you this way. Under normal circumstances, do you have the opportunity on Paxson Lake to gain all the altitude you want before you attempt to cross those passes?

A. Within certain limits, you would be able to (interrupted).

Q. Is there any reason why you can't climb an airplane to its full limit over Paxson Lake without going into the hills? A. Economically, yes.

Q. Now, what did you answer?

A. The operation of an aircraft is a comparatively expensive thing.

Q. Oh, I am not concerned with that. I am asking you do you have room to climb the airplane?

(Testimony of Richard Charles Ragle.)

The Witness: Your Honor, do I have to answer that when he talks to me in that manner?

The Court: Well, I think you should curb yourself a little bit, be a little more considerate. [303]

Mr. Parrish: Your Honor, all I want him to do is answer the question.

Q. (By Mr. Parrish): Now, do you have room to climb a Piper Cruiser airplane to its limit of altitude over Paxson Lake without crossing the hills? A. It can be done, yes.

Q. Is there any reason—it can be done? Now, how wide is Paxson Lake, if you know?

A. I don't have the exact figures.

Q. Now, if it—if you can climb an airplane to the limit of its altitude over Paxson Lake without crossing the hills, why did you say it was necessary to fly under this hill at 500 feet?

A. You are misinterpreting my words.

Q. You didn't say that?

A. I did not say it.

Q. Is it reasonable to expect that there is air currents, vertical air currents next to hills?

A. That condition would always exist, yes.

Q. And is it reasonable to assume that if caught in vertical air currents, a plane will crash?

A. In comparison to the number of times that aircraft are caught in vertical air currents, the number of crashes that ensue are very small. [304]

Q. And could that be because people do not fly close to hills or because they always fly through vertical air currents? A. Neither.

(Testimony of Richard Charles Ragle.)

Q. Is it a practice to stay away from hills with an airplane if it is at all possible?

A. I am afraid your question is too broad to be answered.

Q. Is it a practice to stay away from hills where there might be vertical air currents where you have the opportunity to stay away from them?

A. I am afraid that your question is still too broad to be answered.

Q. Is it a practice to disregard the existence of vertical air currents next to hills? A. No.

Q. What is the practice?

A. The practice is to always approach a hill particularly on the leese side with caution and that—at such an angle that any departure from your flight path can take you away from that potentially dangerous area.

Mr. Parrish: That's all. I think that's—we would like to have a recess now, your Honor.

The Court: Very well. Recess until two o'clock.

(At 12:06 o'clock p.m., the trial of this cause was recessed until 2:00 o'clock p.m.) [305]

(At 2:00 o'clock p.m., May 10, 1951, the trial of this cause was resumed.)

The Court: Counsel ready to proceed with the trial?

Mr. Parrish: Ready, your Honor.

(At this time, Mr. Ragle resumed the witness stand.)

(Testimony of Richard Charles Ragle.)

Mr. Parrish: We have no further questions.

Redirect Examination

By Mr. Boggess:

Q. Professor Ragle, what is a vertical air current, the type normally encountered in mountainous terrain?

A. In any moving body of air where—other than perfectly smooth terrain, conditions exist on the lee-side of every hill where there will be a low pressure circulation of air. Part of that air will be moving parallel to the main body. Part of it will be descending vertically behind the obstruction. Part of it will be moving from one side to the other around the outlines of the obstruction. These so-called vertical movements are merely part of this turbulent circulation.

Q. Now Professor Ragle, assuming that on the surface of Paxson Lake the wind was coming from a northerly direction at [306] from—at a velocity from 10 to 15 miles-an-hour at the time Douglas Heay took off and assuming further that some 20 to 25 minutes previously, the wind had been coming from the opposite direction at the same velocity and assuming further that the accident previously described occurred from five to ten minutes after take-off, would you be able to determine from that fact of wind shift in that period of time at what direction the wind was blowing at an altitude from 2,500 to 3,000 feet above the surface of Paxson Lake?

(Testimony of Richard Charles Ragle.)

A. There would be no essential relationship (interrupted).

Mr. McNabb: Now, just a minute, please.

Mr. Parrish: He didn't ask him what. He just asked him if he could determine it.

Q. (By Mr. Boggess): All right, just yes or no, Professor Ragle.

A. Under those circumstances, the question is too broad to be accurately answered.

Q. From your familiarity with the region in the immediate surrounding terrain and Paxson Lake itself and assuming that the wind shift did occur and from your studies as a meteorologist, what significance if any would you attach to that fact of wind shift?

Mr. Parrish: We object to that, your Honor, as being incompetent, irrelevant and immaterial [307] and partially based on a hypothetical question and partially based on his opinion and not within the issues of this case that I can see.

Mr. Boggess: If the Court please, it is within the issues of this case because counsel has repeatedly referred to Mr. Heay flying on the down side of the mountain. Now, if the air flow may be different at an altitude of 2,500 to 3,000 feet above the lake than it is on the surface of the lake, then without going at least as high as the peak itself, a person would be unable to determine what the flow of air above was and thus be unable to determine what in fact was the leese side of the hill. Now (interrupted).

(Testimony of Richard Charles Ragle.)

The Court: Objection overruled.

The Witness: Would you restate the question, please?

Mr. Boggess: Would you read the question back, Mr. Reporter?

(The question was read to the witness as follows: "Q. From your familiarity with the region in the immediate surrounding terrain and Paxson Lake itself and assuming that the wind shift did occur and from your studies as a meteorologist, what significance if any would you attach to that fact of wind shift?")

The Witness: The wind shift represented massive turbulent air flow and had no relationship to wind [308] aloft.

Mr. Boggess: That's all, Professor Ragle.

Mr. Parrish: That's all.

The Court: That's all then, Professor.

(Mr. Ragle left the witness stand.)

Mr. Boggess: I would like to call the defendant to the stand.

The Court: Very well.

DOUGLAS HEAY

called as a witness in his own behalf, having been previously sworn, testified as follows:

Direct Examination

By Mr. Boggess:

Q. Doug, would—did you sell the engine from a salvage from the wreckage?

Mr. McNabb: I object to that as calling for a conclusion.

The Court: I couldn't understand the question. Just a minute. Will you read it, please?

Mr. Boggess: I will reframe the question.

Q. (By Mr. Boggess): Did you sell the engine salvage from the wreckage, Doug?

Mr. McNabb: I object to that as [309] calling for a conclusion.

The Court: Objection overruled.

The Witness: I gave Louie Frank permission to go up and remove the engine from—before the snow came in there.

Q. (By Mr. Boggess): Did you sell it to Louie?

A. Yes, I did.

Q. How much did you sell it to Louie for?

A. He didn't have money at the time I gave him the engine and he paid me off \$400.00 I think around the 8th or 10th of April.

Q. Did you sell any other equipment belonging to that aircraft, Doug?

A. Well, I accepted a check for \$150.00 for the skis on the aircraft.

(Testimony of Douglas Heay.)

Q. Is that the only equipment appertaining to that aircraft that you sold? A. Yes, it is.

Q. Have you ever seen any other salvage belonging to that aircraft?

A. No (interrupted).

Mr. McNabb: I object to that on the ground it is incompetent, irrelevant and immaterial to the issues; not material to the issues of this case whether he had [310] seen it or not—any of the salvage.

The Court: Objection sustained.

Q. (By Mr. Boggess): Doug, have you ever flown in a Piper Super Cruiser aircraft other than that belonging to the plaintiffs?

Mr. McNabb: I object to that question on the grounds it is not material to the issues involved in this case and on the further grounds it is leading and suggestive.

The Court: What would be the relevancy of it?

Mr. Boggess: I am going to lead up, your Honor, to the matter of values that this witness could have purchased within a week or two of the time of the accident a Piper Super Cruiser of this model and make having the accessories which this plane has as testified to and being in equally good condition (interrupted).

Mr. McNabb: Now, wait a minute. Your Honor, I object to this man testifying here.

The Court: Your question is irrelevant to show anything of that sort. You are asking him if he has flown in one.

Q. (By Mr. Boggess): Have you negotiated for

(Testimony of Douglas Heay.)

the purchase of a Super Piper aircraft make and model like that you wrecked that day? [311]

Mr. McNabb: I object to that question on the ground it is not material to the issues in this case whether he negotiated or not for another airplane. It has nothing to do with the case we are interested in here or the issues in this case.

Mr. Boggess: The question is preliminary, your Honor. I am trying to get up to the asking price of (interrupted).

Mr. McNabb: He can ask that if he wants to.

The Court: Well, proceed then to the point.

Q. (By Mr. Boggess): All right. What was the asking price, Doug?

Mr. McNabb: I object to that as no proper foundation (interrupted).

The Court: Objection overruled.

Mr. McNabb: Your Honor, he hasn't stated—he hasn't stated what he is even talking about. The question is what was the asking price and we have no way of knowing what he was talking about even. He testified (interrupted).

The Court: He connected it up with the plane you mentioned (interrupted).

Mr. Boggess: I am—I will rest, [312] your Honor.

The Court: Very well.

Mr. McNabb: I don't have any questions.

The Court: That's all then.

(Mr. Heay left the witness stand.)

Mr. Parrish: If the court please, could we have a—we didn't know what time it would take to finish with the witnesses of the defendant and we have a man who is out on Week's Field and he has to come in. Could we have an opportunity to call him and get him in here? He is working.

The Court: How long would it take?

Mr. Parrish: I don't think it would take over twenty minutes, your Honor.

The Court: Very well. We'll take a recess until 25 minutes to 3:00.

(At this time, a recess was taken and thereafter the trial of this cause was resumed.)

The Court: Counsel ready to proceed?

Mr. Parrish: Ready, your Honor. At this time, the defendant—the plaintiff would like to call Hawley Evans. Would you come up and just raise your hand in front of the clerk? [313]

HAWLEY N. EVANS

called as a witness in behalf of the Plaintiffs, having been first duly sworn, testified as follows:

Direct Examination

(Rebuttal)

By Mr. Parrish:

Q. State your name, please.

A. Hawley N. Evans.

Q. What is your occupation? A. Pilot.

Q. For what firm do you—are you employed or are you (interrupted).

(Testimony of Hawley N. Evans.)

A. Fairbanks Air Service.

Q. Will you state the—are you a licensed pilot?

A. Yes.

Q. Will you state the nature of your flying experience, Mr. Evans?

A. Well, I have been flying since 1942, as a commercial pilot and military pilot and I have about 6,000 hours now.

Q. What type of aircraft?

A. Well, all types from the lightest to the biggest.

Q. Are you familiar with flying in Alaska?

A. Yes.

Q. How long have you flown in Alaska?

A. Since 1946.

Q. Are you presently engaged in flying in Alaska? [314]

A. Yes.

Q. What is the nature of that flying?

A. Flying instructor and business work—charter work.

Q. Can you state whether or not there are any common practices among Alaskan pilots with regard to flying in hilly or mountainous terrain?

Mr. Boggess: I will object, your Honor, unless he confines himself to the area of the accident in particular.

The Court: It is necessary to make it general, is it?

Mr. Parrish: I was just trying to show the common practice of flying in mountainous terrain or hilly terrain among pilots.

(Testimony of Hawley N. Evans.)

The Court: Objection overruled.

Q. (By Mr. Parrish): Is there such a practice?

A. Well, it depends on the wind and the terrain. It depends on the condition of the day.

Q. Now, what—is there any such practice?

A. Well, in what respect? You mean altitude or how close you are flying or speed in which you must fly?

Q. Is there any practice with regards to approaching high hills or high mountains? Now do pilots normally handle their aircraft on approaching high (interrupted). [315]

Mr. Boggess: I insist, your Honor, we confine ourselves to conditions existing at Paxson Lake. What is a high mountain or what is a low mountain? What is a hill?

The Court: Yes, I think it would do better to limit him to conditions of that sort.

Q. (By Mr. Parrish): Are you familiar with the Paxson Lake area? A. Yes.

Q. Are you familiar with the terrain in and around Paxson Lake? A. Yes.

Q. Will you describe generally the terrain surrounding Paxson Lake?

A. Well, the lake runs north and south and there are low hills on either side of the lake and on the upper end of the lake which is to the north.

Q. Is that on the northwest side of the lake?

A. Well, there are hills from the southeast to the southwest running through the north area.

Q. Is there any practice followed by pilots in

(Testimony of Hawley N. Evans.)

taking off from Paxson Lake if you are flying around those hills?

Mr. Boggess: First, your Honor, I think we better confine this to an aircraft of the nature involved in this accident. [316]

The Court: I think that is a good objection.

Q. (By Mr. Parrish): Is there any practice in flying in and around Paxson Lake on these hills in light aircraft such as a Piper Super Cruiser?

A. Well, the only thing you can say on that is that if you had quite a bit of wind or turbulence, you naturally stay away from any hills until you gained sufficient altitude to clear the hills. In other words, I wouldn't fly next to a hill if it was a wind blowing unless it was on the upwind side.

Q. Let me ask you this. If a flight was being made from Paxson Lake and the airplane a Piper Super Cruiser seaplane with a 115 horsepower Lycoming engine and the takeoff was made in a northerly direction; one turn to the left of approximately 160 degrees and the plane had arrived at an altitude of a thousand feet above the lake and proceeded in a southwesterly direction at approximately 45 degrees angle approaching a hill of the height of 4,500 feet on the northwest end of the lake and the plane was gaining altitude at full power and flying at an air speed of approximately 65 to 70 miles per hour, the plane was about 800 to a 1,000 feet from the crest—from the hill and 400 or 500 feet above the ground and a wind was coming over the hill toward the [317] plane from approxi-

(Testimony of Hawley N. Evans.)

mately a northwesterly direction with little or some turbulence and all the controls and motor was functioning properly on the plane and it went out of control and crashed, falling almost directly to the earth nose first; assuming all these facts to be true, could you state with reasonable certainty the probable cause of the accident?

A. Well, I would say that if it is below the crest of the hill and the wind was on the down wind side, you would imagine he ran into some sort of a downdraft.

Q. How do you avoid those downdrafts?

A. Well, to stay away from hills until you reach a sufficient altitude to clear the hills safely. In other words, you would stay out over the lake, in my opinion, in that particular area.

Q. Will you state that again?

A. I would stay out over the lake until I reached a sufficient altitude. If there was a wind blowing in that direction, you would expect a downdraft I should think. Things change so much all the time it is hard to say for sure whether you are going to expect a downdraft and then again you might not get it.

Q. If you didn't know whether to expect a downdraft or not under these circumstances and you intended to cross this hill or the low saddle between the—on the west side of the lake, would you—would there be any general practice [318] among pilots as to what action to take under those circumstances?

A. Well, yeah. I would think a normal climb

(Testimony of Hawley N. Evans.)

over the lake until you reach sufficient altitude to cross the hill. I wouldn't just go barging right up the hill and expect to go across it if there was a wind blowing like that.

Q. Would you, if you weren't certain there was a wind blowing?

A. If I had very calm air and there was no indication of any wind, I would stay 5 to 600 feet above the ground and climb at an angle to the hill.

Q. If there was any turbulence on the lake, what would your reaction be?

A. Well, you might expect some downdraft near the hill on the downward side of the hill.

Q. Would you fly within 500 feet of that hill?

A. No, not—it depends on the severity of the downdrafts. If it was a rough day, I would stay away well clear of the hill.

Q. Can you tell in advance of coming to a hill whether there will be a downdraft or not?

A. Yes, you can expect a downdraft on the down wind side. If you have a wind blowing from the northwest direction and you're climbing into a hill with the wind blowing down over the hill, you would expect to encounter a downdraft so you [319] would stay away from there.

Q. If making a turn towards the hill you were aware that your plane was gaining ground speed as you turned along the hill, could you normally expect wind coming over the hill?

Mr. Boggess: He is assuming something, your Honor, that there has been no testimony to, that

(Testimony of Hawley N. Evans.)

after he made his turn into the hill he gained ground speed.

Mr. Parrish: I think there is evidence. I think the defendant gave evidence to that.

The Court: Objection overruled.

Q. (By Mr. Parrish): If when you turned you felt an increase in ground speed or ascertained an increase in ground speed, could you expect a downdraft?

A. Yes. Well, you mean you're turning down wind?

Q. That's right.

A. Yeah—no, you wouldn't necessarily expect a downdraft I don't believe. If you reach that point and you got a downdraft, it would be too late to do anything.

Q. Would you fly into that sort of a position?

A. No.

Q. Is that good practice to fly into that sort of a position? A. No.

Q. Is it good practice to fly yourself into a position [320] where you can't fly out of it?

A. No, it isn't.

Q. Is there or is there not any rules relative to flying in that country around Paxson Lake to stay far enough from hills until you can get back to water or pull out of a downdraft if you should hit one?

A. Yes, there is a rule of more or less a rule of thumb.

(Testimony of Hawley N. Evans.)

Q. Will you state what that rule is, how and when it is applied?

A. Depending on the wind conditions, if you have any wind conditions at all, you would naturally stay away from any hills on the downwind side. Usually, you depend on the hills to give you a little lift by getting over on the upwind side. If the wind starts to go up it will help you climb faster, but we don't ever climb on the downwind side of a hill.

Q. You don't ever climb on the downwind side?

A. No.

Q. Why don't you climb on the downwind side?

A. Because you just don't climb as fast and it could be dangerous if you hit a downdraft.

Q. Why would it be dangerous?

A. Well, your air is coming so fast, your airplane can't possibly make any headway against it and the airplane can't take care of it. These small airplanes won't take care of it. [321]

Q. Can a pilot with several hours experience ordinarily tell which way the wind is blowing?

A. How many hours?

Q. Oh, 1,500. A. Yes.

Q. Are any instruction—is any instruction normally given in pilot—to pilots training concerning flying close to hills?

A. That's one of the requirements, yes.

Q. Do you recall the hill at the north end of the lake (interrupted). A. Yes.

Q. Northwest end of the lake? A. Yes.

Q. Now, if you had come off the lake and arrived

(Testimony of Hawley N. Evans.)

at an altitude of 1,000 feet and turned to the left towards the hill and you were going south downwind, would you—in your opinion, would a reasonably prudent pilot fly within 500 feet of the ground under those circumstances?

A. Well, I don't think you would complete a turn and go back down the lake until you could feel out the wind and see what it was doing. I wouldn't necessarily hit right out I don't believe.

Mr. Parrish: That's all. [322]

Cross-Examination

(Rebuttal)

By Mr. Boggess:

Q. Mr. Evans, if you—in gaining altitude, if you took off to the north close to the north end of the lake and climbed, turned and continued your climb to the south for a couple of minutes, turned a 180-degree turn, continued your climb north until you reached approximately the north shore of the lake at which point you have a 1,000 feet altitude, an altitude of 200 feet higher than the altitude of the crest towards which you were headed, the crest of the saddle, you had encountered no turbulence or mild turbulence at the most, the wind at the surface of the lake was steady and smooth from 10 to 15 miles an hour, then you at all times maintained at least a thousand feet from the nearest point horizontally on the terrain with at least 500 feet from the terrain, motor functioning perfectly, climbing at a speed of 70 miles an hour and your

(Testimony of Hawley N. Evans.)

destination—would you step down here a minute—and your destination was that small lake marked “D” from Gulkana Lake and the line marked “X,” double “X” represents a line through the crest of the hill. Under those circumstances, would you have been using good pilot judgment?

A. You took off to the north?

Q. That’s correct.

A. Then we turned south? [323]

Mr Boggess: Just a moment. Mr. Reporter, will you read back that question to the witness, please?

(The question was read to the witness as follows: “Q. Mr. Evans, if you—in gaining altitude, if you took off to the north close to the north end of the lake and climbed, turned and continued your climb to the south for a couple of minutes, turned a 180-degree turn, continued your climb north until you reached approximately the north shore of the lake at which point you have a 1,000 feet altitude, an altitude of 200 feet higher than the altitude of the crest towards which you were headed, the crest of the saddle, you had encountered no turbulence or mild turbulence at the most, the wind at the surface of the lake was steady and smooth from 10 to 15 miles an hour, then you at all times maintained at least a thousand feet from the nearest point horizontally on the terrain with at least 500 feet from the terrain, motor functioning perfectly, climbing at a speed of 70

(Testimony of Hawley N. Evans.)

miles an hour and your destination—and your destination was that small lake marked “D” from Kulkana Lake and the line marked “X,” double “X” represents a line through the crest of the hill. Under those circumstances, would you have been using good pilot judgment?”)

The Witness: Yes, well, it doesn't look to me like the airplane went up very fast, figuring [324] out mentally the man flew for 7 minutes before—by the time (interrupted).

Q. (By Mr. Boggess): Aside from that.

Mr. Parrish: No, let him answer the question.

The Witness: If a man isn't climbing very fast, he is evidently not getting a very good lift out of that area there, so you wouldn't fly very close to the hills. He is climbing at about 150 feet per minute which is not very fast and if your airplane is that sluggish and if you have a wind blowing over that hill (interrupted).

Q. (By Mr. Boggess): Just a moment. Answer my question after I make this further explanation—that he reached his altitude in $4\frac{1}{2}$ —5 minutes.

A. Five minutes, that would be 200 feet a minute up, wouldn't it, which is not really very much. I believe those airplanes do around 5 to 600 feet a minute.

Q. What if it were only $4\frac{1}{2}$ minutes? Then what is your answer under those conditions?

A. He would be doing better and he wouldn't be encountering too much of a downdraft in that area.

(Testimony of Hawley N. Evans.)

Q. Then in that case, would he be exercising good pilot judgment assuming the facts as I stated them? [325]

A. Yes, he would if he was very sure that he wasn't going to get this wind over that hill.

Q. Well, under those circumstances (interrupted).

A. Maybe out over the lake he was getting a pretty good lift from the water.

Q. But I testified he—I assumed he encountered no turbulence or mild turbulence at the most. Was he using good judgment under those circumstances—good pilot judgment?

A. Well, again it just depends on the wind. If—as far as I can see, if he was 200 feet you say above the crest of the hill and he arrived at that altitude in 4 minutes, the airplane was going up at about the proper rate of ascent and a man should assume unless there was a wind blowing that he would get over the hill properly.

Mr. Boggess: That's all.

Redirect Examination

(Rebuttal)

By Mr. Parrish:

Q. Now Mr. Evans, in your flying experience, have you ever heard or do you know of any instance where a man in one minute felt no turbulence at all and in the next minute was in such a downdraft that it pulled the plane clear out under him and into the ground? Is that reasonably so?

(Testimony of Hawley N. Evans.)

A. Well, right at this moment, I can't think of any, no. Usually, if you're going to have any sort of a downdraft, [326] you are going to have (interrupted).

Mr. Boggess: That's all. You've answered his question.

Q. (By Mr. Parrish): Now, if there was any wind blowing under the circumstances that Mr. Boggess gave you, would he be acting as a reasonable pilot?

Mr. Boggess: That question has already been answered, your Honor.

The Court: Well, I would rather have it made clearer. Objection overruled.

Q. (By Mr. Parrish): Under the circumstances that Mr. Boggess gave you, if there was a wind blowing, would you feel that he was exercising reasonable diligence in flying across the saddle at that height of 500 feet? A. No.

Mr. Parrish: That's all.

Mr. Boggess: I have no further questions.

Mr. Parrish: That's all, Hawley. Thanks very much.

(At this time Mr. Evans left the witness stand.)

The Court: How much time do you [327] gentlemen want for argument?

Mr. McNabb: One hour, your Honor.

The Court: One hour?

Mr. McNabb: Yes, sir.

The Court: You think you would need that much?

Mr. McNabb: As I sit here at the moment, I can't tell, your Honor. If I don't feel that I need it, I certainly won't take the court's time.

The Court: Well, all right. We will limit you to one hour.

Mr. Boggess: I can assure the court that my argument will not be nearly so long.

The Court: Very well, proceed.

Mr. McNabb: Your Honor, this cause of action (interrupted).

The Court: Are you electing which one you're going to stand on?

Mr. McNabb: Is that necessary, your Honor?

The Court: Why, I think so.

Mr. McNabb: Well, I didn't know it was necessary to elect.

The Court: I think it is.

Mr. McNabb: Well, so far as I am [328] concerned, that's a new and startling development in this case which I had not anticipated and I believe that the court is—so far as I am concerned, it is—we are not required to elect. However, if that is the court's ruling, then I have no alternative than to do so.

The Court: Yes, I will require you to elect.

Mr. McNabb: Well, your Honor, it is my opinion then that the defendant in this case after having crashed that airplane purchased it and I will proceed on that score.

The Court: That is, you are abandoning your amended one which was on negligence?

Mr. McNabb: It is not my intention to abandon either cause of action. I think it is my opinion that we have proved that he was negligent and that he also purchased that airplane.

The Court: Well, you will go ahead with your argument and if you have any authority that show that you don't have to elect, I will be glad to have them.

Mr. McNabb: Well, I will move at this time, your Honor, that we recess this matter until I have had an opportunity to advise myself on that score.

The Court: I can't do that. You have an attorney, don't you? [329]

Mr. McNabb: Yes, I do, sir.

The Court: Proceed with your argument, then.

Mr. McNabb: You want me to confine my argument to one issue?

The Court: No, I'm going to let you argue on both. You stated which one you would elect.

Mr. McNabb: Then do I understand correctly? I may argue both causes of action?

The Court: Yes.

Mr. McNabb: Very well.

(At this time, Mr. McNabb presented argument to the court.)

(Upon conclusion of Mr. McNabb's argument, Mr. Boggess presented his argument to the court.)

(Mr. McNabb presented further argument to the court and informed the court that he relied on the theory of negligence.)

The Court: Very well. I will find for the plaintiff on the ground of negligence.

Mr. McNabb: Thank you, your Honor.

The Court: In other words, the defendant was negligent. Findings of fact and conclusions of law and judgment may be drawn accordingly.

(At 3:30 o'clock p.m., the trial [330] of this cause was concluded.)

United States of America,
Territory of Alaska—ss.

I, Charles Belida, Official Court Stenographer for the above-named court, do hereby certify as follows, to wit:

That upon the 7th, 8th, 9th and 10th days of May, 1951, I attended all the court proceedings had upon those days in the trial of the above-named cause;

That I recorded in shorthand all of the oral proceedings had in the above-named cause on the dates above mentioned;

That the foregoing pages numbered 1 through 331, both inclusive, constitute a full, true, complete and accurate transcript from my original shorthand notes.

Dated at Fairbanks, Alaska, this 23rd day of June, 1951.

/s/ CHARLES BELIDA,

Official Court Stenographer.

[Endorsed]: Filed June 26, 1951. [331]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, John B. Hall, Clerk of the above-entitled Court, do hereby certify that the following list comprises all proceedings as per Designation of Record by Appellants in the above-entitled cause, viz.:

	Page
1. Complaint	1
2. Answer	3
3. Amended Complaint	5
4. Second Amended Complaint	8
5. Answer to Second Amended Complaint....	12
6. Affidavit for Attachment	13
7. Undertaking for Attachment.....	14
8. Attachment Writ and Affidavit of Service..	15
9. Summons	16
10. Motion to Dismiss Complaint.....	17
11. Notice of Hearing on Above Motion.....	18
12. Order Granting Motion to Dismiss Com- plaint	19
13. Notice of Setting for Trial.....	20
14. Notice of Setting for Trial.....	21
15. Affidavit of Service of Above Notice.....	22
16. Order Setting Cause for Trial.....	23
17. Plaintiff's Subpoenas	24
18. Trial by Court.....	28
19. Motion to Dismiss and to Strike.....	29
20. Order and Trial by Court.....	30
21. Findings of Fact and Conclusions of Law..	35
22. Judgment	37
23. Cost Bill	38

	Page
24. Objections to Plaintiffs' Cost Bill.....	39
25. Clerk's Ruling on Above Objections.....	40
26. Notice of Appeal from Clerk's Ruling.....	41
27. Motion for New Trial.....	42
28. Motion to Set Hearing in re New Trial....	44
29. Order Sustaining Clerk's Ruling on Cost Bill and Denying a New Trial.....	46
30. Notice of Appeal.....	47
31. Supersedeas Bond	48
32. Designation of Record.....	50
33. Transcript of Proceedings at Trial (Pages 1 to 331, incl.).	
34. Exhibits of both parties in brown manila envelope.	

Witness my hand and the seal of the above-entitled Court this 30th day of July, 1951.

[Seal] /s/ JOHN B. HALL,
Clerk of the District Court, Fourth Judicial Division,
Territory of Alaska.

[Endorsed]: No. 13042. United States Court of Appeals for the Ninth Circuit. Douglas Heay, Appellant, vs. Dean Phillips, Charles Gray and James Kelly, Appellees. Transcript of Record. Appeal from the District Court for the Territory of Alaska, Fourth Division.

Filed August 2, 1951.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 13042

DOUGLAS HEAY,

Appellant,

vs.

DEAN PHILLIPS, CHARLES GRAY and
JAMES KELLY,

Appellees.

STATEMENT OF POINTS

The appellant states that the points upon which he intends to rely on this appeal are as follows:

1. That the Trial Court erred in denying defendant's Motion to Dismiss or the alternative, to Strike the second, further and alternative cause of action contained in plaintiffs' Second Amended Complaint. Said Motion appears at page 29 of the original certified record. The Court's order denying said Motion appears at page 5 of the Transcript of Proceedings at Trial.

2. That the Trial Court erred at page 4 of the Transcript of Proceedings at trial in ordering the trial reset for hearing one day after plaintiffs filed their Second Amended Complaint.

3. That the Trial Court erred in denying defendant's Motion for three days' continuance. Defendant's Motion appears at page 7 of the Transcript

of Proceedings at Trial and the Court's order denying said motion appears at page 9 thereof.

4. That the Trial Court erred at page 330 of the Transcript of Proceedings at Trial in permitting the plaintiffs to change their election of remedy from one of contract to one of negligence after defendant had made his final argument.

5. That the Trial Court erred in denying defendant's Motion for a New Trial on the first three grounds assigned in said Motion. Said Motion appears at page 42 of the original certified record. The order denying a new trial appears at page 46 of the original certified record.

/s/ WILLIAM V. BOGGESE,
Attorney for Appellant.

Receipt of Copy acknowledged.

[Endorsed]: Filed August 6, 1951.

[Title of Court of Appeals and Cause.]

DESIGNATION OF RECORD

The appellant hereby designates, by reference to the pages of the original certified record, the following portions of said record which are material to the consideration of this appeal:

	Pages
Complaint	1- 2
Answer	3- 4
Amended Complaint	5- 7

	Pages
Second Amended Complaint.....	8-11
Answer to Second Amended Complaint.....	12
Motion to Dismiss Complaint.....	17
Order Granting Motion to Dismiss Complaint.	19
Motion to Dismiss and to Strike.....	29
Findings of Fact and Conclusions of Law....	35
Judgment	37
Motion for New Trial.....	42-43
Order Sustaining Clerk's Ruling on Cost Bill and Denying a New Trial.....	46
Notice of Appeal.....	47
The following pages, inclusive, of the Tran- script of Proceedings at Trial as numbered by the Official Court Reporter.....	1- 9
and from the following line on the bottom of page 327: "The Court: How much time do you," to the bottom of page 330.	
This Designation of Record and the Statement of Points filed herewith.	

/s/ WILLIAM V. BOGGESS,
Attorney for Appellant.

Receipt of Copy acknowledged.

[Endorsed]: Filed August 6, 1951.

[Title of Court of Appeals and Cause.]

ADDITIONAL DESIGNATION OF RECORD

The Appellees hereby designate the entire record in the above-entitled cause; same includes all of the pleadings, the official Court Reporter's transcription of the proceedings, together with all identification and exhibits herein.

/s/ GEORGE B. McNABB,

/s/ ROBERT A. PARRISH,

Attorneys for Appellees.

Receipt of Copy acknowledged.

[Endorsed]: Filed August 10, 1951.

No. 13,042

United States Court of Appeals
For the Ninth Circuit

DOUGLAS HEAY,

Appellant,

vs.

DEAN PHILLIPS, CHARLES GRAY and
JAMES KELLY,

Appellees.

BRIEF FOR APPELLANT.

WILLIAM V. BOGGESS,

WARREN A. TAYLOR,

P. O. Box 200, Fairbanks, Alaska,

Attorneys for Appellant.

FILED

JAN 21 1952

PAUL P. O'BRIEN

Subject Index

	Page
Statement of pleadings and abstract of case.....	1
Specification of error	3
Argument	3
Introduction	3
Materiality of amendment	6
Surprise	9
Form and manner of application	13
Abuse of discretion and prejudice	16

Table of Authorities Cited

Cases	Pages
Baker v. Jensen (1931), 135 Or. 669, 295 P. 467.....	6
Balm v. Nunn (1884), 63 Iowa 641, 19 N.W. 810.....	12
Central Truckaway System v. Harrigan (1949), 79 Ga. App. 117, 53 S.W. (2d) 186	12
Charlesworth v. American Express Co. (1918), 117 Me. 219, 103 A. 358	4
City of Wichita Falls v. Lipscomb (1932), 50 S.W. (2d) 867	14
Dispatch Laundry Co. v. Employer's Liability Assur. Corp., Ltd. (1908), 105 Minn. 384, 117 N.W. 506.....	17
Donaldson v. Clark (1942), 163 S.W. (2d) 226	12
Flint v. Atlas Mut. Ins. Co. (1907), 134 Iowa 531, 112 N.W. 1	15
George v. Wiseman (1938), 98 F. (2d) 923.....	12
Louisville & N. R. Co. v. Tuggle (1913), 151 Ky. 409, 152 S.W. 270	12
Roberts v. Kemp (1928), 218 Ala. 350, 118 So. 656.....	12
Sapp v. Aiken (1886), 68 Iowa 699, 28 N.W. 24.....	13
State ex rel. Stanley v. American Surety Co. of New York (1935), 80 S.W. (2d) 260	18
Union Indemnity Co. v. Webster (1928), 218 Ala. 468, 118 So. 794	12
Wright v. Northern Pac. Ry. Co. (1905), 38 Wash. 64, 80 P. 197	19

Statutes

ACLA 1949, Sec. 52-1-7	13
ACLA 1949, Sec. 55-7-10	13
ACLA 1949, Sec. 58-4-25	13
28 U.S.C. Sec. 41	3
28 U.S.C. Sec. 1291	3
48 U.S.C. Sec. 101	3

Texts

17 C.J.S. Sec. 71, pp. 244-246	4
17 C.J.S. Sec. 72, p. 249	19
17 C.J.S. Sec. 73, pp. 247, 248	9

**United States Court of Appeals
For the Ninth Circuit**

DOUGLAS HEAY,

Appellant,

vs.

DEAN PHILLIPS, CHARLES GRAY and

JAMES KELLY,

Appellees.

BRIEF FOR APPELLANT.

STATEMENT OF PLEADINGS AND ABSTRACT OF CASE.

On the 24th day of January, 1951, appellees filed a complaint (T. R. 3-4) in the District Court for the District of Alaska, 4th Division, alleging essentially that appellant, after destroying appellees' aircraft, had promised to pay to appellees the sum of \$3,000.00 for said aircraft. Since there was no consideration alleged to support the pleaded promise, appellees' motion to dismiss (T. R. 21) this complaint was granted (T. R. 22). On the 19th day of March, 1951, appellees filed an amended complaint (T. R. 6) which corrected their first defective pleading by alleging a prior promise on the part of appellant, as bailee, and in consideration of the bailment of, "to pay the reasonable value of same (the aircraft) if destroyed

while in defendant's possession''. To this amended complaint, appellant filed an answer which operated generally to deny the existence of any contract modifying the usual obligations attached by operation of law to a contract of bailment (T. R. 5). With the issues thus drawn on the question of whether or not a contractual liability existed obligating appellant to pay the sum of \$3,000.00 for the destroyed aircraft, appellees at the trial of said cause (as regularly set on the 7th of May, 1951, and prior to the introduction of any evidence) were permitted by the court to file a second amended complaint (T. R. 9, 50) alleging as an alternative cause of action the negligent destruction by appellant of appellees' aircraft. Although appellant promptly moved for a continuance, the cause was reset for the following day over appellant's objection that one day's extension was inadequate (T. R. 50, 51).

On the next day appellant moved for a continuance of three days based on the appellees' amendment and his need for preparation to meet the new issue thus tendered (T. R. 52-55). This motion was denied and counsel were directed to proceed with the trial (T. R. 56).

Judgment was rendered on the issue of negligence alone. (Findings of Fact and Conclusions of Law, T. R. 33-34).

The denial of appellant's motion for continuance is claimed as error. Appellant filed a motion for new trial in the court below in which one of the grounds stated was the ruling complained of (T. R. 40, 41).

The question was saved for the consideration of this court by assigning the trial court rulings on appellant's motion for continuance and motion for new trial as error in the statement of points filed herein (T. R. 338, 339).

The jurisdiction of the District Court is based upon Title 48, U. S. Code, section 101 (48 U.S.C.A., section 101). This court has jurisdiction to entertain this appeal by virtue of the authority conferred upon it by Title 28, U. S. Code, sections 41 and 1291.

SPECIFICATION OF ERROR.

The trial court erred in denying appellant's motion for a three-day continuance (T. R. 52-56) and in overruling appellant's motion for new trial (T. R. 40, 43).

The trial court's denial of appellant's motion for continuance and motion for new trial brings before this court for appellate review the question of whether or not the trial court abused its discretion in denying appellant's motion for continuance and whether or not appellant was thereby prejudiced.

ARGUMENT.

INTRODUCTION.

As a general rule, any party confronted by a substantial amendment of his adversary's pleading is entitled to a continuance where such amended plead-

ing operates to his surprise and to his prejudice. The refusal or grant of such continuance rests in the sound judicial discretion of the trial court. Such discretion is, of course, subject to appellate review. A statement of this rule is set out in 17 *C.J.S.*, section 71, pages 244 to 246 as follows:

“It is generally held that, while any substantial amendment of the pleadings which operates as a surprise to the opposite party, who has not been guilty of any lack of diligence, usually entitles him to a continuance, the mere fact that a pleading is amended does not of itself entitle the opposite party to a continuance as a matter of course.

The granting of a continuance on the ground of surprise caused by the amendment of pleadings is largely within the discretion of the court, and this discretion will not be disturbed unless it appears that it has been abused.

Prejudice. One of the important considerations in the matter of granting or refusing a continuance is whether applicant would be prejudiced by a refusal. Thus it must appear that applicant cannot safely proceed with the trial, or is less prepared to do so in consequence of the amendment as allowed than if the amendment had been denied, as where different or additional evidence, otherwise unnecessary, is required to meet the amendment.”

An excellent statement of the meaning of judicial discretion with reference to the grant or denial of continuances is contained in *Charlesworth v. American Express Co.* (1918), 117 Me. 219, 103 A. 358, 359 as follows:

“The granting or denying of a motion for continuance is of course recognized as a matter of judicial discretion, but the term ‘judicial discretion’ does not mean the arbitrary will and pleasure of the judge who exercises it. It must be a sound discretion exercised according to the well established rules of practice and procedure, a discretion guided by the law so as to work out substantial equity and justice. It is magisterial, not personal discretion. The chief test as to what is or is not proper exercise of judicial discretion is whether in a given case it is in furtherance of justice. If it serves to delay or defeat justice it may well be deemed an abuse of discretion. Incidents attending the progress of the trial are necessarily addressed to the discretion of the court. ‘That discretion is not to be exercised arbitrarily, but to be guided and controlled, in view of all the facts, by the law and the justice of the case, subject only to such rules of public policy as have been wisely established for the common good. *York and Cumberland R. R. Co. v. Clark* 45 Me. 151, 154.’

“It has been held in many states that if an amendment in pleading is made as a matter of substance, and the adverse party is surprised, he is entitled to a continuance. See cases cited in note to *Stevenson v. Sherwood*, 22 Ill. 238, 74 Am. Dec. 140, 143; and it may be stated as the general policy of the courts to grant a sufficient postponement or continuance to the adverse party, if desired, to enable him to secure the testimony needed to meet the new issue. To refuse this is ground for exception.”

A determination of whether or not the discretion of the trial court has been abused in a given case must necessarily be ascertained from an examination of the particular facts involved in that case. See *Baker v. Jensen* (1931), 135 Or. 669, 295 P. 467. In light of the foregoing statement of the general rule with reference to the denial or grant of continuances, and the statement of the proper appellate attitude to be taken in a review of the trial court's discretion in granting or refusing such continuances, we may proceed to a determination of whether or not there has been an abuse of discretion in the instant case.

We will consider first the question of whether or not the amendment made in this case was a material or substantial one. Next, we will consider whether or not the amendment made operated to the surprise of the appellant. We will then discuss the effect to be given appellant's informal application for continuance, and in conclusion consider the question of prejudice and the portions of the record necessary to a determination of such prejudice.

MATERIALITY OF AMENDMENT.

No serious argument can be made that appellees' second amended complaint (T. R. pages 9-12) filed on the day set for trial did not present a material and substantial amendment to appellees' previous pleadings in the cause. That second amended complaint introduced as a completely new issue the question of

whether or not appellant had negligently flown appellees' aircraft resulting in its destruction. The original complaint (T. R. pages 3 and 4) set up a defective action on contract alleging a promise unsupported by consideration to pay the sum of \$3,000.00 as the value of the aircraft after its destruction (paragraph 4 of complaint, T. R. 4). This complaint, having been dismissed on appellant's motion pointing out such defect to the trial court, appellees on the 19th day of March, 1951, filed an amended complaint (T. R. pages 6 to 8) which cured the defect of the prior pleading by inserting in paragraph 2 thereof a prior promise by appellant to pay the reasonable value of said aircraft if destroyed while in his possession.

No intimation is contained in either the original or first amended complaint that appellees intended to rely on any other theory of recovery than a contractual one. It was not until the day set for trial and after counsel for the respective parties had announced ready that appellees advised the court and appellant that they were also relying on a tort theory of recovery (T. R. 49).

As apparent as it would seem that the injection of a new and different theory of recovery in addition to issues previously drawn constitutes a material and substantial amendment, the trial court stated at T. R. 51 in resetting the trial for the next day:

"Well, there is a slight difference in the pleading. It seems to me that it involved the same principles originally as it does now. So, I will reset it for hearing tomorrow—for trial tomorrow morning at ten o'clock."

The trial court was silent as to the reasons supporting its opinion that the issues previously drawn were substantially the same. If it were suggested that paragraphs 3 of the original complaint and the amended complaint should suggest to appellant that appellees were relying on the doctrine of *res ipsa loquitur* to prove negligence, it is sufficient answer that no evidence of negligence could be introduced under that paragraph. It is fundamental law that that doctrine is a rule of evidence and that it is necessary to expressly plead negligence if you wish to rely on that doctrine. Furthermore, under appellees' original and amended complaint an allegation of possession under bailment was essential to their contractual theory of recovery, and it is submitted that a defendant should be no more chargeable with the suggestions inherent in subtle imperfections in pleadings than a plaintiff should be chargeable with the obligation and responsibility of making his theories of recovery clear prior to trial. Also, in both the original and amended complaint, appellees prayed for interest which would indicate clearly that they thought they were suing in contract and not in tort. For the reason stated, we conclude that the trial court erred in its ruling on appellant's motion for continuance in so far as that ruling may be based on the trial court's opinion that appellees' second amended complaint did not operate as a material and substantial change of its prior pleadings in the cause.

SURPRISE.

The general rules governing absence of surprise as ground of refusing continuance are stated in 17 *C.J.S.*, section 73, pages 247, 248 as follows:

“It is a well established rule that an application for a continuance based on an amendment of the adversary’s pleadings is properly denied where it does not appear that the amendment operates as a surprise to applicant, or where it affirmatively appears that applicant had actual knowledge of the facts alleged in the amendment. There is no surprise constituting a ground for continuance where the subject matter of the amendment is, or has been treated by the parties as being, in issue, or where the matter claimed to cause surprise is proper defensive matter to a new issue brought into the case by applicant.

Where the original pleadings are full enough to put the adverse party on notice, or to give him a reasonable premonition, as to the matter embraced in the amendment and the likelihood of its being raised on or before the trial, the amendment is no cause for a continuance on the ground of surprise. Thus, where evidence of the facts alleged in a trial amendment is admissible under the original pleading, a refusal of a continuance asked for on the ground of surprise is not error. Similarly the filing of an amendment is not matter of surprise warranting a continuance, where it merely sets forth in more detail the matters alleged in the original pleading; or states such matters in a different manner; or where the matter set up in the amended pleading is identical with that disclosed by the affidavit which accompanied the original declaration, or by the bill of

particulars, or by answers to applicant's interrogatories. No continuance on the ground of surprise should be granted where the effect of the amendment is merely to put the case exactly where the opposite party claims it should be, as where the amendment is allowed to cure a defect which has been relied on by the opposite party to defeat the pleading, although the contrary has been held in the case of an amendment for the purpose of taking the case out of the statute of frauds."

Although the specific reason assigned by the trial court for denying appellant's motion for continuance was its opinion that the previous pleadings in the cause were sufficiently full to reasonably apprise appellant of the new issue and that he was therefore not injured (T. R. 55, 56), it is anticipated that appellees may argue that appellant was not in fact surprised by the amendment because of his statement made at page 49 of the transcript of record as follows:

"Mr. Boggess: 'Mr. McNabb, I presume you're alleging negligence now, is that correct?' "

which statement was made prior to appellant's having seen the proposed second amended complaint. It is therefore thought necessary that the true meaning of surprise as employed by the courts in ruling on motions for continuance be clarified. "Surprise" ordinarily connotes the state of mind which results from an unexpected event or the occurrence of any event not anticipated. "Surprise", legally, is divorced to a great extent from its factual lay concept. The ad-

judicated cases considered always with close scrutiny of the facts upon which they are based show that the courts are primarily concerned with the determination of the question of whether or not a party is entitled to *rely* on surprise as the grounds for continuance.

True, the record discloses that appellant, confronted with the amendment of the complaint, then anticipated that it contained an additional count of negligence and perhaps, arguably, previously anticipated that a last minute amendment might be made. To hold, however, that such anticipation precluded a right to rely on surprise would operate to establish a rule which would be impossible of administration and which would penalize experienced counsel. It would be difficult to apply since what in fact may be anticipated by an attorney would turn upon such factors as his experience, intelligence and aptitude for his profession. It would operate as a penalty because experienced, educated and brilliant counsel are seldom surprised in the lay sense of that word. Are they then to be required to prepare their case beforehand for every trial amendment which their craft and experience cause them to anticipate? Considering the limited amount of time which each practitioner has to devote to the several cases in which he has been retained, such a rule would make a successful lawyer out of a dullard and a pauper out of a wise man.

Moreover, the cases which are cited in support of the categorical proposition that, absent surprise, a party is not entitled to a continuance where confronted with an amended pleading are not applicable

to the instant case. In cases where surprise in its factual sense has been employed as a reason or basis for denying a motion for continuance, the existence of such absence of surprise is apparent in the record before the court. For example, where the party moving for continuance has already testified to the matters which are made the basis for a supplemental pleading, that party is not entitled to a continuance. *George v. Wiseman* (1938), 98 F. (2d) 923 and *Donaldson v. Clark* (1942), 163 S.W. (2d) 226. Also, where the amendment is made at trial to conform the pleadings with proof of an alleged fact treated by the parties throughout the proceedings as being an issue then there is no abuse of discretion in denying a motion for continuance. *Roberts v. Kemp* (1928), 218 Ala. 350, 118 So. 656; *Louisville & N. R. Co. v. Tuggle* (1913), 151 Ky. 409, 152 S.W. 270.

It is also to be noted that in many instances where the courts speak in terms of absence of surprise as the grounds for denying a continuance, the real basis of their rulings is that the amendments are not material and that the evidence introducable under the amended pleading would have been introducable under the issues as previously drawn. For example, see *Union Indemnity Co. v. Webster* (1928), 218 Ala. 468, 118 So. 794; *Balm v. Nunn* (1884), 63 Iowa 641, 19 N.W. 810; *Central Truckaway System v. Harrigan* (1949), 79 Ga. App. 117, 53 S.W. (2d) 186.

With reference to the absence of surprise as the grounds for denying continuance, the rule laid down by the Iowa court in *Sapp v. Aiken* (1886), 68 Iowa

699, 28 N.W. 24, is designed to obtain and promote justice. In that case it was held that an attorney need only prepare his case to meet the issues drawn by the pleadings.

FORM AND MANNER OF APPLICATION.

The question here presented is whether or not the trial court's ruling in the instant case upon an oral application for continuance supported only by the unsworn statement of counsel may be reviewed for abuse of discretion.

No territorial statute exists which requires that an application for continuance based on material amendment of an adversary's pleading be made in writing or supported by an affidavit or other proof. Such requirement does exist, however, where the grounds are absence of evidence (A.C.L.A. 1949, section 55-7-10) and non-return of a commission to take testimony (A.C.L.A., 1949, section 58-4-25). Nor do the uniform rules of the District Court for the District of Alaska, effective March 7, 1947, as amended, impose any requirement, mandatory or otherwise, that an application for continuance be in writing and supported by affidavit or other proof.

The instant case, it is submitted, falls under A.C.L.A. 1949, section 52-1-7 which provides in full as follows:

"A court or judicial officer has power to adjourn any proceedings before it or him from time to time, as may be necessary, unless otherwise expressly provided by this code."

The power to grant a continuance or adjournment of proceedings under this provision of the code should be wisely and judiciously exercised and the refusal to exercise that power in a proper case should be subject to appellate review in the interests of justice.

But even were it held as a general rule of practice without reference to the absence of court rule or statute that applications for continuance must be in writing and supported by affidavit or other proof, such rule would have no application in the instant case.

No objection was made to the form or manner of appellant's application. Both court and counsel treated appellant's application as a motion in the case and permitted appellant to make an oral statement in support of that motion also without objection. Nor did the court choose to rely on any defect in the manner or form of the application in overruling it. The particular grounds stated by the court for rejection of appellant's motion were as follows:

"I think the matter presented by the pleadings before the last amendment were such that the defendant was reasonably apprised of the whole situation and that he is not injured by this recent amendment." (T. R. 55, 56.)

and, inferentially, that such amendment was not material.

In *City of Wichita Falls v. Lipscomb* (1932), 50 S.W. (2d) 867, upon motion for rehearing, appearing at page 873 of the Reporter opinion, an order denying

an unverified motion for continuance was held subject to review for abuse of discretion even though a statute required verification of such motions where, as in the instant case, no objection was made to the form of the motion. *A fortiori*, the reason for such ruling should be applicable where no statute or rule of court dictates the form or requisites of an application for continuance.

Also in support of the proposition that an oral motion for continuance may be considered on the discretion involved in its denial, see *Flint v. Atlas Mut. Ins. Co.* (1907), 134 Iowa 531, 112 N.W. 1 in which case, upon trial amendment, an oral motion for continuance and oral statement of movant counsel in support thereof was taken down by the official reporter. Stated the Iowa court at page 2 of the opinion as it appears in the Northwestern Reporter:

“The point now made by the appellee that the motion was not made in writing does not seem to have been made below. Moreover, a motion thus made in the midst of a trial and dictated in the record should, in our opinion, be considered as being in writing, especially where the trial court and parties have recognized it as a motion in the case.”

Considering that the primary object sought in appellate review of rulings is the “promotion of substantial justice”, it is also submitted that formal defects should not be relied on to sustain the ruling of a trial court which does not effect that end. Particularly should that be true where, as in the instant

case, a material amendment is made on the day set for trial. If equities were weighed between counsel, some tolerance in form should be extended toward counsel who states that he expended every reasonable effort to prepare for trial to meet an amendment which could have been made prior to trial date.

Expeditious handling of litigated matters, of course, is a commendable goal leading to public endorsement of and satisfaction with the American trial system and administration of justice. But, expedition should not be replaced by haste.

PREJUDICE AND ABUSE OF DISCRETION.

Did the trial court abuse its discretion to appellant's prejudice?

Appellant's motion for and statement in support of motion for three days' continuance appears at pages 52 to 54 of the transcript of record. Appellant's counsel pointed out to the trial court that he had diligently attempted to prepare for trial to meet appellees' second amended complaint and accounted for his time from the court's adjournment on the preceding day. Although counsel asked for but three days' continuance in order to organize his notes and work out a plan of procedure for the trial, his request was denied. Appellant particularly pointed out that the effect of "downdrafts or vertical air currents on an aircraft in flight" would be subsequently material to the cause. Although appellees offered to permit

a continuance after presentation of their case (T. R. 54) appellant advised the court that preparation of his case was important in cross-examination of appellees' witnesses (T. R. 55). He further advised the court that the responsibility of any continuance rested directly on appellees who had waited until the day of trial to amend their complaint.

The statement of appellant's counsel definitely reveals that he had been surprised and that he was less ready to go to trial than if appellees' amendment had not been made.

If appellant's statement was somewhat indefinite and short in detail, it is submitted that the case falls squarely within the rule stated in the case of *Dispatch Laundry Co. v. Employer's Liability Assur. Corp., Ltd.* (1908), 105 Minn. 384, 117 N.W. 506 at page 508 as follows:

“* * * Therefore, when respondent attempted to introduce evidence of an issue not in the pleadings, by interrogating Mr. Norris, president of respondent company, as to the intelligence of the injured girl, appellant was entitled to object to that line of inquiry, and respondent was forced to amend its complaint. It did so by entirely eliminating the original ground of negligence upon which the settlement was made, and introducing a new issue. Under such circumstances appellant company could not be called upon to disclose what particular additional witnesses it would call, provided a continuance was granted, nor could it be required to disclose what such testimony would be. Appellant was not respon-

sible for the condition which made an amendment to the complaint necessary. A suggestion by reputable counsel that the case had been prepared for trial upon the issues presented by the pleadings, and that he was not prepared to go on with the trial upon the new issues, was all that could reasonably be required under the circumstances presented by this record. In a case where there is such a radical change of issues by amendment to the complaint in the course of the trial, counsel for defendant could not, until investigation, be expected to specify what additional witnesses would be called to meet the new condition. While recognizing that the trial court was endowed with the power to exercise reasonable discretion, we believe that the amendment placed the defendant in a position which required a continuance of the case.”

Certainly an important factor in determining whether or not the trial court's discretion has been abused is that of who is responsible for the necessity of such continuance and the time which the amending party has had since the commencement of the suit to determine what course is necessary and what amendments he should make. *State ex rel. Stanley v. American Surety Co. of New York* (1935), 80 S.W. (2d) 260.

The instant case was commenced on the 24th of January, 1951. A trial date of May 7, 1951 was set on the 13th of April, 1951 (T. R. 25), with counsel for both parties present. Prior to April 13, appellees had already amended their complaint without setting

up any cause of action on a theory of negligence. Although appellees had twenty-four days after the matter was set for trial and over three months from the time the action was commenced to advise the court and opposing counsel of their intention to rely, in the alternative, on a theory of recovery in tort, they waited until the day set for trial to give such notice.

Still another factor which should be weighed in determining whether the court has abused its discretion is the time elapsed between the filing of an amended pleading and the time set for trial. As stated in 17 C.J.S., sec. 72, p. 249:

“The time elapsed between the amendment and the time the adverse party is required to proceed with the trial is one of the factors considered by the court in the exercise of its discretion as to the granting or refusal of continuances on the ground of surprise resulting from amendment of the pleadings.”

Although the Federal Rules of Civil Procedure empower the trial court, in its discretion, to permit an amended pleading at any stage of the proceedings (Rule 15) such discretion is abused if it is submitted where a substantial amendment is made on the day set for trial and the court does not allow the surprised opponent at least the ten day period to answer and prepare his defense ordinarily provided by the rule. Compare with *Wright v. Northern Pac. Ry. Co.* (1905), 38 Wash. 64, 80 P. 197, where statutory period of twenty days to answer complaint is treated

as the minimum period which should be extended on motion for continuance to defendant to answer and prepare to meet new issues tendered by material amendment of plaintiff's complaint.

In summary, the amendment was material, it caused surprise and resulted in appellant being unprepared to meet the issues tendered.

There remains to be considered the question of whether appellant was actually prejudiced by the amendment as permitted. It is submitted that prejudice should be presumed in the denial of a request for a continuance for a reasonable period of time where a material trial amendment is made and the movant is not prepared to proceed with the trial. No examination of the transcript of evidence, under such circumstances, would reveal whether or not there was such lack of preparation detrimental to movant. The appearance of the record would depend largely on the ability and past experience of individual counsel and could in no way be an accurate index of what such counsel could have done in representing his client if he had been extended adequate time to prepare. For that reason, appellant, in the instant case, did not designate for printing any part of the evidence adduced at the trial.

However, appellees did designate for inclusion the entire transcript of evidence. If this court deems it necessary to examine the whole record to determine whether or not the appellant was in fact prejudiced, the following information should be important. Evi-

dence reported at the trial 'covers 274 pages of the transcript of record, those pages being 58 to 352, inclusive. Of these 274 pages, 221 pages are devoted to the examination of appellees' witnesses. Of these 221 pages, only 48 pages are devoted to the issue of contract—those pages covering the testimony of Dean Phillips, one of the appellees, covered by pages 117 to 156 of the transcript, the testimony of Charles James Freericks appearing at pages 249 to 253 of the transcript, and Floyd James whose testimony appears at pages 157 to 162 of the transcript. All of the testimony of the remaining witnesses, consuming some 125 pages of the transcript of record on direct and redirect examination, was devoted to the issue of negligence, which issue was casually stated by appellees' counsel on the day set for trial as "just an allegation, your honor, on the alternative cause of action which was—is the subject of this action was in fact operated in a negligent manner" (T. R. 49). But for this "just an allegation" some 125 pages of direct testimony would have been inadmissible and it was to meet 125 pages of testimony that the court thought appellant needed no time in which to prepare.

Also the transcript of record reveals that appellant's suggestion to the court that "the effect of down drafts or vertical air currents on an aircraft in flight" would be subsequently material is verified (T. R. 53). Those factors and the related factors of wind and turbulence in mountainous areas consumed the greatest part of the testimony of appellees' expert witnesses Randall K. Acord, whose testimony appears at pages 211 to 248 of the transcript of record, and Hawley

N. Evans, at pages 320 to 332 of the transcript of record. It is further to be noted that a considerable portion of the testimony of Douglas Heay, the appellant, called by appellees to testify at the outset of the trial, covers such questions as his knowledge of air currents, winds and turbulence and the effect of those factors on an aircraft in flight and the particular meteorological conditions affecting the flight of the aircraft the day of the crash. The technical nature of the questions involved and the closeness of the question involved as apparent from the transcript of record leads one inevitably to the conclusion that appellant was entitled to his three days' continuance and to deny it to him was an abuse of discretion. It is even suggested by the record that the delayed pleading of appellees was a calculated surprise for the presentation of their case indicates that they were prepared on the question of negligence several days before trial. Equal courtesy should have been extended the appellant.

We wish to note that the rule governing second or further continuances should have no bearing in this case. Appellees' first motion was in effect denied by the trial court when it stated at page 51 of the transcript of record in effect that the amended pleadings involved the same principles as the original pleading. Certainly resetting the case for hearing the next day was not calculated to enable appellant to prepare his case.

In conclusion, whether the erroneous denial of a motion for continuance on the grounds of a material

amendment to the complaint is presumably prejudicial or whether it is necessary to determine from the whole record whether the applicant for record was in fact prejudiced, it is submitted that under either rule appellant is entitled to the grant of a new trial by this court and an opportunity to meet appellees' case on negligence fully prepared.

Dated, Fairbanks, Alaska,
January 21, 1952.

Respectfully submitted,
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Receipt of typewritten copy
of foregoing brief acknowledged
this 15th day of January, 1952.

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Of Attorneys for Appellees.

No. 13,042

United States Court of Appeals
For the Ninth Circuit

DOUGLAS HEAY,

Appellant,

VS.

DEAN PHILLIPS, CHARLES GRAY and
JAMES KELLY,

Appellees.

BRIEF FOR APPELLEES.

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Subject Index

	Page
Statement of pleadings and abstract of case	1
Argument	1

Table of Authorities Cited

Cases	Pages
Adams v Adams, 79 W Va 546, 92 SE 463	2
Automotive Underwriters of Des Moines, Iowa v Bloemer, 94 F 2d 474, 1938	7
Brandt v Krogh, 111 Pac 275, 14 Calif App 39	2
Coltrane v Templeton, CCA, 106 F 370	7
Cox v Hart, 145 US 376	7
Dale v Beasley, 81 SE 849	9
Dispatch Laundry Co. v Employers Liability Assurance Corp. Ltd, 1908, 105 Minn 384, 117 NW 506	12
Downes v Cassidy, 47 Mont 471, 133 Pac 106	6
Druckman v Forsyth Furniture Lines Inc., 22 F 2d 59, CCA 4th 1927	10
Federal Life Ins. Co. v Rascoe, 12 F 2d 693, CCA 6th 1926	10
Fields v US, 27 App DC 433	9
Gidionsen v Union Depot RR Co., 31 SW 800, 129 Mo 392	2
Gilbert v Lachapelle, et al, 127 F 2d 750	6
Goodyear Service Inc. v Pretsfelder, 84 F 2d 242, CCA, Dist. of Columbia, 1936	5, 9
Harrah v Morgantheau, 89 F 2d 863, 1937	5
Henderson v Hazlett, 83 SE 907, 75 W Va 255	2
Horn v United Securities Co., 81 Pac 1009, 47 Ore 35 ...	2
Howes v Clark, 24 Pac 116	9
In re Schulte-United, 59 F 2d 553, 1932	7
Isaacs v US, 159 US 487	9
Jennings v American President Lines, 143 Pac 2d 329, 61 Calif App 2d 417	2
Keener Oil and Gas Co. v Bushong, Supreme Court of Okla- homa, 56 Pac 2d 819, 1936	9
Knowles v Blue, 95 So 481	6
Lyman v Warner, CCA, 113 F 87	7

	Pages
McCollum v Schubert, 185 SW 2d 84, Kansas City Court of Appeals, 1944	10
Moens v US, 50 App DC 15, 267 F 317	9
Morton Butler Timber Co., 91 F 2d 884, 1937	6
Panama RR Co. v Pigott, CCA, 256 F 837	7
Pocahontas Distilling Co. v US, CCA, 218 F 782	7
Porter v Anderson, 113 Pac 345, 14 Calif App 716.....	2
Richmond RR & Electric Co. v Dick, CCA, 52 F 379....	7
Sanders v Hall, 74 F 2d 399, cert. den. 55 Sup Ct 653, 1935	5
Schritchfield v Kennedy, 103 F 2d 467, 1939	7
Smith v US, 63 F 2d 252, 1933	7
Southern Kansas Stage Lines v Gibson, 87 F 2d 23, 1937..	5
Speers Sand & Clay Works, Inc, v American Trust Co., 52 F 2d 831, 1931	7
State v Price, 131 SE 710, 100 W Va 699	2
Texas & Pacific RR Co. v Humble, CCA, 97 F 837	8
US v Rio Grande Dam and Irrigation Co., 184 US 416....	7
Virginia Beach Bus Line v Campbell, 73 F 2d 97, cert. den. 55 Sup Ct 637, 1934	5, 6, 7
Wood & B Co. v Hewitt Lbr. Co., 89 W Va 254, 109 SE 242	2

Texts

12 Am Jur, Continuances, Sec. V, pp 450, 451	2, 5
12 Am Jur, Continuances, Sec. IX, p 454	5
12 Am Jur, Continuances, Sec. 19, p 461	2

**United States Court of Appeals
For the Ninth Circuit**

DOUGLAS HEAY,

Appellant,

VS.

DEAN PHILLIPS, CHARLES GRAY and

JAMES KELLY,

Appellees.

BRIEF FOR APPELLEES.

STATEMENT OF PLEADINGS AND ABSTRACT OF CASE.

The statement of pleadings and abstract of case as specified by appellant is substantially correct and call for no further comment.

ARGUMENT.

The appellees herein will agree that as a general rule of law a party litigant is entitled to a continuance upon request where a turn in the proceedings operates to his surprise and to his prejudice; however, the grant of a continuance rests in the sound discretion of the court and will not be disturbed unless

such discretion is abused. Surprise of such a nature as to warrant an appellate tribunal in finding that the trial court abused its discretion must be of such nature that counsel was, in fact, prejudiced or injured in the preparation and submission of his case. *Jennings v American President Lines*, 143 Pac 2d 329, 61 Calif App 2d 417; *State v Price*, 131 SE 710, 100 W Va 699; *Gidionsen v Union Depot RR Co.*, 31 SW 800, 129 Mo 392; *Henderson v Hazlett*, 83 SE 907, 75 W Va 255; *Brandt v Krogh*, 111 Pac 275, 14 Calif App 39; *Porter v Anderson*, 113 Pac 345, 14 Calif App 716; *Horn v United Securities Co.*, 81 Pac 1009, 47 Ore 35.

The fundamental principle running throughout the subject of continuances is that the granting or refusal of a continuance rests in the discretion of the court to which the application is made. Its ruling in reference thereto will not be disturbed by an appellate tribunal unless an abuse of discretion is shown. 12 *Am Jur* Continuances, Sec. V, p 450, 451 and footnotes. Surprise alone is not sufficient. 12 *Am Jur* Continuances, Sec. 19, p 461. A continuance is not a matter of "right". Satisfactory cause must be shown. *Wood & B Co. v Hewitt Lbr. Co.*, 89 W Va 254, 109 SE 242, *Adams v Adams*, 79 W Va 546, 92 SE 463.

We turn then to the question of whether counsel for the appellant was, in fact, surprised at the trial of this cause. On the 7th day of May at or about the hour of 10:00 o'clock A.M., counsel for appellees requested permission of the trial court to file an

amended complaint setting out a separate and alternative cause of action in negligence. At that time counsel for appellant made the following statement:

“Mr. McNabb, I assume you are alleging negligence now. Is that correct?” (T.R. 49.)

Such statement negatives any claim by appellant that he was surprised in fact. A further examination of the transcript of record at pages 49, 50 and 51 will disclose that counsel for appellant forthwith requested a continuance of an undetermined length and failed to specify to the court when, if ever, he would be prepared to meet the new issues.

The court was then advised that plaintiff Phillips would not be available to testify in support of his complaint if any undue delay were caused. The court will note on page 51 of the transcript of record the absence of any objection to the cause being reset for 10:00 o'clock on the 8th day of May, 1951.

On the 8th day of May, for reasons best known to himself, counsel for appellant filed and argued a motion to dismiss an alternative motion to strike the second cause of action in plaintiff's second amended complaint and then orally moved the court for a three day continuance, which motion was not supported by affidavits and based only on the ground that there “still remains some work for me to do to reduce my notes, etc. to a proper working order.” (T.R. 51, 52 and 53.)

In his motion counsel for appellant requested a three day continuance. (T.R. 54.) The court should

bear in mind that counsel had previously been advised that it would be impossible for plaintiff Phillips to remain in Fairbanks for the trial of this cause for any extended period. In opposing the motion for the continuance, counsel for the plaintiff advised the court as follows:

“However, at this time I request the court that we proceed in this matter, in that as I stated to the court yesterday, our principal witness must return to Naknek, the place of his employment, and if this matter is continued for three days at this time, it is for all practical purposes the same as continuing the matter until next November, or the next term of Court.” (T.R. 54.)

In reply counsel for appellant stated as follows:

“Now, I am sympathetic with plaintiff’s position that this cause may have to be continued until next November because of Mr. Phillip’s employment; but where does the responsibility rest for any necessity of continuing this matter until next November?”

And further,

“Therefore, the matter may be adjourned beyond three days as far as I am concerned. Whenever Mr. Phillips can come back up here to try this cause, but I can’t see why I should be forced to go to trial to the prejudice of my client, regardless of my own personal feelings in this abrupt manner.” (T.R. 55.)

In the latter quotation, we find the only reference made by counsel for appellant to prejudice. No show-

ing of any injury, surprise or prejudice was made. No affidavits were presented for the court's consideration. No statement was made concerning the unavailability of witnesses. In fact, an examination of pages 56, 57 and 58 of the transcript of record will indicate that counsel for appellant neither objected to the court's refusal to grant a three day continuance, nor did he state to the court that he was not in fact ready and prepared to proceed with the trial of this cause.

Appellant and appellees herein are in accord on the proposition that a motion for a continuance is addressed to the sound discretion of the trial court. The decision of the trial court will be disturbed on appeal only for an abuse of discretion. *Goodyear Service v Pretsfelder*, 84 F 2d 242, 1936; *Harrah v Morgantheau*, 89 F 2d 863, 1937; *Virginia Beach Bus Line v Campbell*, 73 F 2d 97, cert. den. 55 Sup Ct 637, 1934; *Sanders v Hall*, 74 F 2d 399, cert. den. 55 Sup Ct 653, 1935; *Southern Kansas Stage Lines v Gibson*, 87 F 2d 23, 1937. See also 12 *Am Jur Continuances*, Sec. V, p 450, 451 and footnotes.

The mere fact that the time for preparation for trial has been short is not in itself grounds for a continuance where it is not known that the defendant has been deprived of the testimony of absent and material witnesses or that the court's discretion has been otherwise abused. 12 *Am Jur Continuances*, Sec. IX, p 454.

Where the counsel does not offer to show that an amendment presents an issue which he is not fully prepared to meet or that he has not at hand and is ready to introduce all the evidence available in support of the defense, a continuance is properly refused. *Downes v. Cassidy*, 47 Mont 471, 133 Pac 106. In the case of *Gilbert v Lachapelle, et al*, 127 F 2d 750, the court said,

“This appeal is brought to have us declare the action of the trial court an abuse of discretion. No rule is more firmly established than that the decision on matters relating to the time of trial is exclusively within the province of the trial court. By the very nature of things that court is more full handed of the facts than we can be by an inspection of the record and unless there has been a clear abuse of discretion, we will not reverse.”

Citing *Knowles v Blue*, 95 So 481; *Virginia Beach Bus Line v Campbell*, 73 F 2d 97. The court said further,

“It is only when a final judgment on the merits has been rendered that the order refusing the continuance may be examined in its true perspective, and the rights of the parties fairly weighed.”

An error must be deemed harmless if on examination of the entire record, substantial justice has resulted to the parties. *Morton Butler Timber Co.*, 91 F 2d 884, 1937.

The burden is on the appellant, not only to prove error, but that it was prejudicial. *Smith v US*, 63 F 2d 252, 1933; *In re Schulte-United*, 59 F 2d 553, 1932; *Automotive Underwriters of Des Moines, Iowa v Bloemer*, 94 F 2d 474, 1938.

For error to be reversible the burden is on the complaining party to show from the record as a whole the denial of some substantial right. *Schritchfield v Kennedy*, 103 F 2d 467, 1939. In the case of *Virginia Beach Bus Line v Campbell*, 73 F 2d 97, 1934, the court said,

“The point urged as to the abuse of discretion by the trial judge is based principally upon the refusal to grant the defendant a continuance. In approaching this question, we must bear in mind that the question is not whether the trial judge should have granted a continuance. That is a matter which the law leaves to his judgment and not that of the appellate court. Whether a continuance shall be granted or not is a matter resting in his sound discretion and the appellate court has no power to interfere with the exercise of that discretion unless it has been abused by the trial judge.”

Cox v Hart, 145 US 376; *US v Rio Grande Dam and Irrigation Co*, 184 US 416; *Speers Sand & Clay Works, Inc. v American Trust Co.* 52 F 2d 831, 1931; *Pocahontas Distilling Co. v. US*, CCA 218 F 782; *Lyman v Warner*, CCA 113 F 87; *Coltrane v Templeton*, CCA 106 F 370; *Richmond RR & Electric Co. v Dick*, CCA 52 F 379; *Panama RR Co. v. Pigott*, CCA

256 F 837; *Texas & Pacific RR Co. v Humble*, CCA 97 F 837.

“Further, we do not feel that under the circumstances here it can properly be said that there was an abuse of discretion on the part of the district judge in refusing a continuance. Of course, counsel assumed that after the March term in Elizabeth City that there would be no further term until September, but that on calling the special term in May, the judge had the clerk notify counsel that it had been called so that they would be ready to try their cases at that time. That counsel for defendant did not receive the notice was due to the fact that he was in Washington and his mail was not properly forwarded to him. Plaintiff was not responsible for this and was on hand with his witnesses at considerable expense. The case was continued until Thursday to give the defendant’s attorney an opportunity to be present and he was present with his associates and witnesses and tried the case. The only absent witness that he indicated a desire to have present was one who had procured the release which was attacked. That it may well have appeared to the trial judge, as it does to us, that this witness would not have been of value to the defendant if he had been present. *In view of the inconvenience and expense which a continuance would have caused plaintiff, we cannot say that it was an abuse of discretion to refuse to continue for the absence of a witness of such doubtful value to defendant.* A careful examination of the record convinces us that defendant was in nowise prejudiced by not having him present. *Defend-*

ant did ask for a continuance but did not show any necessity therefor. It did not show wherein it was unable to meet the facts pleaded by the amendment; it did not produce witnesses to contradict the evidence and made no contention that it could produce other evidence on the question if granted a continuance. There was no showing of prejudice.”

In *Goodyear Service Inc. v. Pretsfelder*, 84 F 2d 242, CCA, Dist. of Columbia, 1936, in ruling upon an alleged error in refusing a continuance, the court, among other things, said as follows:

“And the granting of a continuance of one month, as requested, would have resulted in the postponement of the trial of the cause until the following term of court; wherefore, we feel that the ruling of the lower court upon this subject should not be disturbed.”

Citing *Isaacs v US*, 159 US 487; *Fields v US*, 27 App DC 433; *Moens v US*, 50 App. DC 15, 267 F 317; *Howes v Clark*, 24 Pac 116; *Dale v Beasley*, 81 SE 849.

In *Keener Oil and Gas Co. v. Bushong*, 56 Pac 2d 819, Supreme Court of Oklahoma, 1936, the court said,

“Defendant did ask for a continuance, but he did not show any necessity therefor. He did not show wherein it was unable to meet the facts pleaded by the amendment; it did not produce witnesses to contradict the evidence and made no contention that it could produce other evidence

on the question if granted a continuance. There was no showing of prejudice.”

In *McCollum v Schubert*, 185 SW 2d 84, Kansas City Court of Appeals, 1944, the court said,

“The most that could be said for the amendment was that it constituted a material variance. While defendant filed an affidavit of surprise, it would appear from the record that there is no likelihood of defendant being able to produce any other witness than those he had at the trial and the court did not abuse its discretion in refusing to grant him a continuance.”

In *Federal Life Ins. Co. v Rascoe*, 12 F 2d 693, CCA 6th 1926, the court held that where no evidence was introduced until two days after an order was entered transferring the cause from equity to law and a hearing was not concluded until the day thereafter, the court did not abuse its discretion, in denying the defendant’s motion for a continuance for a week or more on the theory that the transfer of the cause and amendment of the complaint required testimony of defendant’s officers who were then in Chicago. The court held that the presumption was in the absence of contrary proof, that the delay would be for convenience only and not because of necessity.

In *Druckman v Forsyth Furniture Lines Inc.*, 22 F 2d 59, CCA 4th 1927, the court said,

“It is unnecessary to cite the numerous decisions that hold that a continuance of a cause rests in the sound discretion of the trial court. The judge who has the cause before him is, of

course, in much better position to determine whether an application, apparently fair on its face, is in reality not bona fide, but for purposes of delay, than an appellate tribunal could possibly be."

After examining the entire record, the court held that there was nothing in the record which would justify the conclusion that the discretion of the trial court had been abused.

We turn then to an examination of the probability of the appellant's actual surprise and the possibility of prejudice arising therefrom. Appellant contends that he was surprised by the filing of appellees' Second Amended Complaint. Such contention is belied by the unsolicited remark by Mr. Boggess:

"Mr. McNabb, I presume you are alleging negligence now. Is that correct?" (T.R. 49.)

Appellant forthwith moved for a continuance, which was granted for a period of 24 hours, by the trial court, without objection. On the 8th day of May, 1951, the trial court convened and the appellant, being aware that plaintiff Phillips could not remain longer for the trial, (T.R. 50), requested a continuance for three days on the ground that there remains "some work for me to do to reduce my notes, etc. to a proper working order." (T.R. 53). Appellant would have this court believe that appellees perpetrated and prosecuted a nefarious scheme to thwart justice and prevent appellant from properly presenting his defense. Suffice it to say that if appellant were in fact surprised and prejudiced, such surprise resulted and

prejudice arose from appellant taking the witness stand and testifying as the first witness for the appellees. Appellant does not specify as error the action of the trial court in overruling his "nebulous objections" to having Douglas Heay called as the first witness for the appellees. (T.R. 57.) Appellees concur in appellant's belief that "experienced, educated and brilliant counsel are seldom surprised in the lay sense of the word." (Appellant's Brief 11.)

Appellant relies on the case of *Dispatch Laundry Co. v Employers Liability Assurance Corp. Ltd*, 1908, 105 Minn 384, 117 NW 506. In the *Dispatch Laundry* case an amendment was apparently made to plaintiff's complaint during the course of the trial. And a refusal in that instance to grant to the defendant a continuance was held abuse of the trial court's discretion and reversible error. Here appellant had a continuance for a twenty-four hour period, during which time he examined his expert witness, Dr. Richard Charles Ragle. He also consulted at length with Douglas Heay, the appellee. The court will note that the only expert witness called by appellant was Dr. Ragle. Counsel admits that "I spent roughly three hours with Prof. Ragle at the University of Alaska inquiring from him of his knowledge of vertical air currents from his experience in flying in Alaska." (T.R. 53.) Having spent that amount of time interviewing Prof. Ragle and having called no other expert witness, it is reasonable for this court to assume that either (1) it was the intention of the appellant to rely solely and entirely upon the testimony of this

expert witness or, (2) he was unable to secure any other person to act as a witness who concurred in Prof. Ragle's views. Certainly appellant should not now be heard to complain that he had an inadequate time to prepare his defense when he had, in fact, interviewed each of his witnesses prior to the time at which he requested a continuance.

Appellant would have this court believe that he had an inadequate amount of time in which to prepare for the cross-examination of the expert witnesses of appellees. It is submitted that counsel spent three hours with his expert witnesses on the 7th day of May, 1951, and was not called upon to examine the first of appellees' expert witnesses, Randall K. Acord, until 2:00 o'clock P. M. on the 9th day of May, 1951, or the second, Hawley N. Evans, until 2:35 o'clock P. M. on the 10th day of May and after his expert Ragle had testified.

It is submitted that the failure of appellant to request a continuance at the close of appellees' case, which request, if made, would have been granted by the court without objection from appellees as is indicated by the transcript, (T.R. 54), his failure to call any additional witnesses, the fact that appellant had interviewed all of his witnesses prior to trial, the testimony of the defendant, Douglas Heay, and the abrupt manner in which appellant rested his case, (T.R. 319), lead to the inescapable conclusion that the failure of the trial court to grant appellant's three day continuance resulted in no prejudice to his case

and, in fact, negative any suggestion, implication or statement that he was in fact surprised.

Whether appellee's amendment was in fact material is not relevant to this appeal; neither is the form and manner of the application for a continuance. The question before this court is whether the appellant was in fact surprised, and if so surprised, whether a refusal of the court to grant a further continuance was prejudicial to the presentation of appellant's case.

It is submitted that an examination of the record will adequately disclose that there was neither surprise nor prejudice resulting from the court's refusal to grant the requested continuance, but that, in fact, there was ample testimony to sustain a finding for the plaintiffs on either the tort or contract theories. If there were error committed by the trial court, it was in the court's requirement that the appellees elect one of their alternative theories. It is appellees' contention that the court could have found for the plaintiffs upon the theory of contract and that the requested continuance was for the purpose of delaying the trial of the cause until the November term, as the purpose of this appeal is to prevent and delay execution upon the judgment properly rendered for appellees.

Appellees herein patiently waited from the 20th day of September, 1950, until the 31st day of March, 1951, for the appellant to pay them the reasonable value of the aircraft as appellant had promised and agreed

to do. To recover the value of their aircraft, appellees were not only required at great expense and inconvenience to themselves to institute suit, but appellant attempted unsuccessfully to increase their loss by filing objections to plaintiffs' cost bill as appears on page 38 of the transcript.

Appellant further claims error in the refusal of the trial court to grant a new trial on the grounds that the trial court abused its discretion in refusing to grant the three day requested continuance. Appellees submitted that the trial court had opportunity to observe the demeanor of counsel for appellant, the appellant, his witnesses, the manner and nature of the cross-examination of appellees' witnesses as conducted by counsel for appellant and the absence of further requests for a continuance by appellant and the absence of any claim by appellant that he was surprised by any particular phase of the case as it was presented. Basing his decision upon personal observation, the trial court believed that substantial justice had been done by the parties and overruled the appellant's motion for a new trial.

It is the duty of this court to do substantial justice between the parties and to put an end to litigation. From an examination of the transcript it will be abundantly obvious to this court that a retrial of the issues herein will be concluded in a second judgment in favor of the appellees, from which it is reasonable upon the basis of our experience in this cause to anticipate an additional appeal and an addi-

tional trial. Ad Infinitum. An end to litigation and justice between the parties can only be accomplished by an affirmance by this court of the judgment below.

Dated, Fairbanks, Alaska,
February 20, 1952.

Respectfully submitted,

GEORGE B. McNABB, JR.,
of ROBERT A. PARRISH AND
GEORGE B. McNABB, JR.,
Attorneys for Appellees.

No. 13043

United States
Court of Appeals
for the Ninth Circuit.

CHARLES R. NEIBAUER,

Appellant,

vs.

CAPTAIN MAX R. HARRIS, Commanding
Officer, Montana Induction Center, Butte,
Montana,

Appellee.

Transcript of Record

Appeal from the United States District Court,
for the District of Montana.

FILED

JAN - 7 1952

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	PAGE
Bond on Appeal.....	14
Clerk's Certificate.....	27
Designation of Record to Be Printed for Use Upon Appeal (U.S.C.A.).....	30
Designation of Record (U.S.D.C.).....	19
Names and Addresses of Attorneys of Record..	1
Notice of Appeal.....	14
Order Filed June 15, 1951.....	9
Order Filed June 21, 1951.....	12
Order Granting Stay.....	16
Petition for Writ of Habeas Corpus.....	3
Statement of Points.....	29
Statement of Points (U.S.D.C.).....	31
Stipulation Filed June 18, 1951.....	11
Transcript of Hearing On Petition for Writ of Habeas Corpus.....	21
Witness, Court's:	
Harris, Captain Max R.	
—direct	23
Writ of Habeas Corpus.....	9

NAMES AND ADDRESSES OF ATTORNEYS
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United States District Court, District of Montana

CHARLES R. NEIBAUER,

Petitioner,

vs.

CAPTAIN MAX R. HARRIS, Commanding Officer,
Montana Induction Center, Butte, Montana,

Respondent.

THE PETITION OF CHARLES R. NEIBAUER
FOR A WRIT OF HABEAS CORPUS

To the Honorable United States District Judge
in and for the District of Montana.

The petition of Charles R. Neibauer, residing in the County of Blaine, and State of Montana, respectfully shows as follows:

I. That he is a citizen of the United States and is of the age of twenty-five (25) years.

II. That he duly registered with Local Board No. 3, for Blaine County, at the City of Chinook, State of Montana, pursuant to the provisions of the Selective Service Act of 1948.

III. That, in conformity with the Selective Service Act, your petitioner dutifully filed a questionnaire, and as required, therein set forth his status, and asked to be placed in Class II C.

IV. That Local Board No. 3, for Blaine County, at the City of Chinook, State of Montana, consisting of Edward T. Jenkins, Clarence Simons and

Vern McIntyre, had powers granted to it by the Selective Service Act, the regulations promulgated thereunder, and the proclamation of the President of the United States, to classify registrants for service in the armed forces of the United States, and for limited service, and to grant deferments and exemptions. That said Local Board No. 3, aforesaid, was instructed by the authority of the Congress and the President of the United States as to their duties regarding classifications of registrants, and required to exercise great care in making the classifications required to be made under the prescribed regulations.

V. That your petitioner made application to said Local Board No. 3 and to the members thereof to be classified II C for the reason that he was exclusively engaged in agriculture in the production for market of wheat, sheep and cattle, operating 1800 acres, and that he was principally responsible for the operation of said acreage; that living on said farm with him and dependent upon him were his father, mother and brother, but that the Local Board aforesaid and the State Appeal Board, disregarding his rights and reasons for such classification, classified your petitioner in Class I A, thereby making your petitioner immediately eligible for service in the armed forces of the United States.

VI. That your petitioner thereupon, and within the time provided therefor, appealed said classification to the appropriate Appeal Board and Agency, and that said Appeal Board, acting on said appeal, continued your petitioner in Class I A, without

dissenting vote; that your petitioner, having no further appeal, petitioned the National Director of Selective Service and the State Director of Selective Service as within the regulations provided for a review of the determination of the Local and State Board, and for an appeal to the President of the United States; that said petitions were denied; petitioner further requested the Local Board to reopen and consider anew his classification on the basis of a change in registered status resulting from circumstances over which petitioner had no control, which request was denied by the local board, without hearing; petitioner further petitioned the State Director and National Director of Selective Service to issue a written request to the Local Board to reopen and consider anew petitioner's classification which petitions were denied.

VII. That Local Board No. 3, and the said Appeal Board, and the said State and National Directors of Selective Service, denied your petitioner his lawful rights in placing him in Class I A, which rights were granted to your petitioner under the provisions of the Selective Service Act of 1948, the regulations and the proclamation of the President of the United States, and that your petitioner has exhausted his administrative remedies by appeal and petition as provided in said act, and regulations, and that your petitioner will be forced to remain in wrongful custody or compelled to commit a crime by virtue of the void and invalid classification and order to report for induction.

VIII. That your petitioner submitted full and conclusive proof both to local board No. 3 and to the appropriate Appeal Board that petitioner was exclusively engaged in agriculture in the production for market of wheat, sheep and cattle, which are essential to the National Defense and to the preservation of the National Economy, and that he was principally responsible for the operation of a unit of 1800 acres; that in detail he offered proof that his father is, and was at the time when petitioner's claim for classification was made, physically unable to operate and manage the farm unit; that his said father suffers a serious heart ailment and condition as well as arthritis, and is now hospitalized for said condition by doctors orders at the Deaconess Hospital at Havre, Hill County, Montana, that said condition is growing progressively worse and which condition according to advice of physicians regularly in attendance upon petitioner's father, might and may result in death upon the strain of farm work. That petitioner's mother is unable to support herself and is unable to operate or manage said farm; that petitioner's brother is and will be unable to operate or manage said farm unit by reason of a permanent physical disability. Your petitioner further shows that he was denied a fair and impartial hearing upon such claim for classification, that the Local Board arbitrarily and capriciously refused both petitioner and his father any right to personally appear before the said Board on the matter of his classification, that said Board discriminated against said petitioner because

of his membership and activity in a farm organization, that said Local Board declined to hear pertinent evidence which petitioner offered both in regard to the matter of his classification and in the request to reopen and consider anew his classification, and that said boards acted arbitrarily and in the abuse of their discretion and without any basis in fact in placing and continuing your petitioner in Class I A.

IX. That on or about the 18th day of May, 1951, your petitioner received a notice from Local Board No. 3 of the County of Blaine, City of Chinook, State of Montana, informing him that he had been selected for induction into the Army of the United States, and directing him to report to said Local Board on the 13th day of June, 1951, at 8:15 a.m. for transfer to the United States Army Induction Station at Butte, Montana, for induction.

X. That your petitioner reported to the United States Army induction station at Butte, Montana, on the 14th day of June and that he is, as of the date of the filing of this petition and has, from the time of reporting to said United States Army Induction Station, been wrongfully restrained of his liberty under or by color of the authority of the United States under and by virtue of a void and invalid classification and order of induction, and that at said induction station he was examined as to his physical, social and moral standards and was accepted; that Captain Max R. Harris is now the Commanding Officer of said induction center and

as such wrongfully holds your petitioner in custody awaiting transfer to Fort Lewis to begin his service, and that said custody is, and will be in violation of petitioner's rights under the Constitution of the United States and the Selective Service Act of 1948, and the regulations promulgated thereunder.

Wherefore, your petitioner prays:

(1) That a Writ of Habeas Corpus issue from this honorable court to be directed to Captain Max R. Harris, aforesaid, and whomsoever may hold your petitioner in custody, commanding him or them to have the body of your petitioner before the District Court of the United States for the District of Montana, on the 19th day of June, 1951, at the opening of court on that day, or at such other time as in such Writ shall be specified, for the purpose of inquiring into the cause of the restraint and detention of your petitioner, and to do and abide such order as the court may make in the premises.

/s/ JERRY J. O'CONNELL,
Attorney for Petitioner.

Affidavit of verification attached.

[Endorsed]: Filed June 15, 1951.

[Title of District Court and Cause.]

ORDER

Upon reading the petition of Jerry J. O'Connell, attorney for petitioner, and good cause appearing therefore,

It Is Ordered

That a Writ of Habeas Corpus issue out of this court directing the production of the body of said Charles R. Neibauer before the court on the 19th day of June, 1951, at Helena, Montana.

Dated this 15th day of June, 1951.

/s/ W. D. MURRAY,
United States District Judge.

[Endorsed]: Filed June 15, 1951.

[Title of District Court and Cause.]

WRIT OF HABEAS CORPUS

The President of the United States of America to Captain Max R. Harris, Commanding Officer of the United States Army Induction Station, Butte, Montana, and to whomsoever else may have the custody of the body of Charles R. Neibauer, Greetings.

You are hereby commanded, that the body of Charles R. Neibauer, by you restrained of his liberty, as it is said, detained by whatever name the said Charles R. Neibauer may be detained together with the day and cause of his being taken and de-

tained, you have before the Honorable W. D. Murray, District Judge of the United States District Court in and before the District of Montana, at the courtroom of court, in the city of Helena, at 10:00 o'clock in the forenoon of the 19th day of June, 1951, so as to do and receive what shall then and there be adjudged concerning the said Charles R. Neibauer, and have you then and there this writ.

Witness the Honorable W. D. Murray, United States District Judge, at Helena, Montana, this 15th day of June, 1951.

/s/ H. H. WALKER,
Clerk.

Marshal's Return

I hereby certify and return that I received the within Writ of Habeas Corpus at Butte, Montana, on the 15th day of June, 1951, and executed the same by serving the within-named Captain Max R. Harris, Commanding Officer of the U. S. Army Induction Station, at Butte, Montana on the 15th day of June, 1951.

D. A. BATCHOFF,
U. S. Marshal.

By /s/ ETHEL FLEMING,
Deputy.

[Endorsed]: Filed June 20, 1951.

[Title of District Court and Cause.]

STIPULATION

It Is Hereby Stipulated and Agreed, by and between Counsel for the Petitioner herein, Jerry J. O'Connell, Esq., and Counsel for the Respondent herein, Dalton Pierson, Esq., United States District Attorney, that the hearing ordered by the Honorable W. D. Murray, United States District Judge, in the above-entitled cause, for ten (10:00 a.m.) o'clock a.m. on the 19th day of June, 1951, at Helena, Montana, be and is continued until a day to be set by said court herein.

Done at Butte, Montana, this 18th day of June, 1951.

/s/ JERRY J. O'CONNELL,
Attorney for Petitioner.

/s/ DALTON PIERSON,
United States District Attorney, Attorney for
Respondent.

/s/ R. LEWIS BROWN, JR.,
Assistant United States
District Attorney.

[Endorsed]: Filed June 18, 1951.

In the District Court of the United States for the
District of Montana, Helena Division

CHARLES R. NEIBAUER,

Petitioner,

vs.

CAPTAIN MAX R. HARRIS, Commanding Of-
ficer, Montana Induction Center, Butte Mon-
tana,

Respondent.

ORDER

The above matter having regularly come on for hearing before this Court on June 19, 1951, at 10:00 a.m., at Helena, Montana, and the respondent, Capt. Max R. Harris, being present in Court and represented by R. Lewis Brown, Jr., Esq., Assistant United States Attorney for the District of Montana, and the petitioner not being present in person nor represented in Court by counsel, and the Court having heard testimony and having considered the evidence and being fully advised in the premises, and it appearing therefrom to the satisfaction of the Court that the petitioner was not, and is not now, a member of the Armed Forces of the United States and was not inducted into the Armed Forces of the United States, and it further appearing that the petitioner herein was not on the date, or dates, set forth in his petition for Writ of Habeas Corpus restrained of his liberty nor held in custody against his will by the respondent, Capt. Max R. Harris, nor by any other representative, or representatives, of the Armed Forces of the United States, or at all

Now Therefore It Is Ordered, and this does order, that the Writ of Habeas Corpus heretofore issued by this Court be dissolved, and the same hereby is dissolved, and that the Petition for Writ of Habeas Corpus heretofore filed with the Clerk of Court upon which hearing was had herein be dismissed, and the same hereby is dismissed.

Dated at Butte, Montana, this 20th day of June, 1951.

/s/ W. D. MURRAY,

United States District Judge.

United States of America,
District of Montana—ss.

I, H. H. Walker, Clerk of the United States District Court for the District of Montana, do hereby Certify that the foregoing papers hereto annexed constitute the Judgment Roll in the above-entitled action.

Witness my hand and seal of said Court this 21st day of June, 1951.

[Seal]

H. H. WALKER,
Clerk.

By /s/ ELIZABETH E. SPRINGER,
Deputy.

[Endorsed]: Filed and Entered June 21, 1951.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Charles R. Neibauer, Petitioner, hereby appeals to the United States Court of Appeals for the Ninth Circuit from that final judgment entered in this action on the 19th day of June, 1951, to wit, that order of the Honorable W. D. Murray, United States District Judge for the District of Montana, Helena Division, dissolving the writ of habeas corpus granted by said Court on June 15th, 1951, and dismissing the petition filed therein.

Dated this 22nd day of June, 1951.

/s/ JERRY J. O'CONNELL,
Attorney for Petitioner and
Appellant.

[Endorsed]: Filed June 22, 1951.

[Title of District Court and Cause.]

BOND ON APPEAL

Know All Men By These Presents:

That I, Charles R. Neibauer, as principal, and the Royal Indemnity Company, as surety, are held and firmly bound unto Captain Max R. Harris, Commanding Officer, Montana Induction Center, United States Army and Air Force Station, Butte,

Montana, in the full and just sum of Two Hundred Fifty (\$250.00) Dollars, to be paid to the said Captain Max R. Harris, as Commanding Officer of the Montana Induction Center, United States Army and Air Force, Butte, Montana, his attorney, the United States District Attorney for Montana, and his successors and assigns; to which payment, well and truly to be made, we bind ourselves, our successors, and assigns, jointly and severally by these presents.

Sealed with our Seals and dated this 22nd day of June, 1951.

Whereas, lately at a session of the District Court of the United States for the State of Montana in an action pending in said court designated as Civil No. 521, between Charles R. Neibauer, Petitioner, and Captain Max R. Harris, Commanding Officer, Montana Induction Center, judgment and order was duly made, given and entered on June 19, 1951, by the Court, and Charles R. Neibauer, having filed with the said District Court, in the office of the Clerk of said Court a Notice of Appeal as provided by the Rules of Civil Procedure for the District Courts of the United States,

Now, the condition of the above obligation is such, that if the said Charles R. Neibauer shall prosecute his said appeal to effect, and shall answer all costs that may be awarded against him if he fails to make his plea good, or if the appeal is dismissed or the order or judgment affirmed, or such costs as the Appellate Court may award if the

Order is modified, then the above obligation to be void; otherwise to remain in full force and effect.

CHARLES R. NEIBAUER,
Petitioner.

By /s/ JERRY J. O'CONNELL,
His Attorney in Fact and at
Law.

ROYAL INDEMNITY
COMPANY,

By /s/ WM. E. RAE,
Attorney in Fact.

Countersigned:

MORROW AND LOUTTIT
INSURANCE AGENCY,

By /s/ KEITH M. LOUTTIT,
Montana Licensed Agent.

[Endorsed]: Filed June 27, 1951.

[Title of District Court and Cause.]

ORDER GRANTING STAY

By order of the Honorable W. D. Murray, United States District Judge, for the District of Montana, a writ of habeas corpus was granted to the petitioner and directed to respondent herein; said respondent was ordered thereby to produce the body of petitioner whom he was unlawfully restraining

under the color of the authority of the United States of America at a hearing to be held before said Court at Helena, Montana, at 10:00 o'clock a.m. on the 19th day of June, 1951;

Said hearing was held on said day and after hearing testimony of the respondent herein said court by order entered on the same day dissolved the writ of habeas corpus and dismissed the petition of petitioner herein;

On the 22nd day of June, 1951, within the time prescribed by the Federal Rules of Civil Procedure of the Court of Appeals of the Ninth Circuit and the provisions of title 28 United States Codes Annotated petitioner herein gave notice of appeal of said final order and judgment dissolving said writ and dismissing said petition by filing said notice of appeal with the Clerk of said Court.

It appearing that there is good cause therefor and the prevention of injustice to appellant herein by virtue of the provisions of Rule 29, sub-division 2, of the Rules of the Circuit Court of Appeals for the Ninth Circuit which provide that where a writ of habeas corpus has been issued and discharged the court may allow a stay of proceedings upon the furnishing of a supersedeas bond or may grant release to the appellant on his own recognizance; and by virtue of the provisions of rule 45, section 2, of the United States Supreme Court Rules with reference to a stay of proceedings upon appeal from an order discharging a writ of habeas corpus, which rule provides that where a writ of habeas corpus has been issued and discharged, upon

appeal to the Circuit Court of the order discharging said petition the court may grant a stay of proceedings, either upon the furnishing of a supersedeas bond in a sum to be fixed by the court or may release the petitioner on his own recognizance as the court may see fit,

It is hereby ordered that all proceedings for the execution or enforcement of the induction of petitioner herein into the Army of the United States are hereby stayed until the final determination of the appeal taken by the petitioner from said judgment and order of the District Court, and it is further ordered that the aforesaid stay is granted on condition that the petitioner herein in the event said appeal is determined against him or is dismissed he will abide by and promptly carry out and fulfill the directions of the respondent herein and on the further condition that the petitioner promptly prosecute the said appeal.

Dated this 22nd day of June, 1951.

CHARLES N. PRAY,

United States District Judge.

[Endorsed]: Filed June 22, 1951.

Entered June 23, 1951.

[Title of District Court and Cause.]

DESIGNATION OF RECORD

To the Hon. H. H. Walker, Clerk of the United States District Court for the District of Montana, Helena Division:

You are hereby requested to prepare, certify and transmit to the Clerk of the United States Court of Appeals for the Ninth Circuit, with reference to the Notice of Appeal heretofore filed by the Petitioner in the above cause, transcript of the record in the above cause, prepared and transmitted as required by law and by the rules of said court, and to include in said transcript of record the following documents or certified copies thereof, to wit:

1. Petition for Writ of Habeas Corpus, filed by the Petitioner herein on his behalf and at his request and direction, by his Attorney of Record, Jerry J. O'Connell, Esq., on the 15th day of June, 1951.

2. The Order of the Hon. W. D. Murray, United States District Judge, that a Writ of Habeas Corpus issue out of said Court, filed the 15th day of June, 1951.

3. The Writ of Habeas Corpus directed to the Respondent herein issued by the Clerk of said Court on the 15th day of June, 1951.

4. The Stipulation entered into and agreed upon by and between Jerry J. O'Connell, Esq., Attorney of record for the Petitioner herein, and Dalton

Pierson, United States District Attorney for Montana, and his Assistant, R. Lewis Brown, attorneys of record for the Respondent herein, dated the 18th day of June, 1951, and filed in the office of the Clerk of said Court on the same date.

5. The Order of the Hon. W. D. Murray, United States District Judge, entered and filed on the 21st day of June, 1951, in the Clerk of the said Court's office, dissolving the Writ of Habeas Corpus theretofore issued by said Court, and dismissing the Petition for Writ of Habeas Corpus theretofore filed with the Clerk of said Court.

6. Notice of Appeal to the United States Court of Appeals for the Ninth Circuit, filed with the Clerk of said Court on the 22nd day of June, 1951.

7. The Bond on Appeal filed with the above Notice of Appeal.

8. The Order of the Hon. Charles N. Pray, United States District Judge, issued on the 22nd day of June, 1951, granting a Stay of Execution to the Petitioner herein.

9. The complete transcript of the hearing held before the Hon. W. D. Murray, United States District Judge, at Helena, Montana, on June 19, 1951, as taken down by the Reporter for said Court, and all exhibits, if any, offered in evidence at said hearing.

10. Petitioner's Statement of Points intended to be relied upon on said appeal.

11. This Designation of Record.

Dated at Great Falls, Montana, on this 19th day of July, 1951.

/s/ JERRY J. O'CONNELL,
Attorney for the
Petitioner herein.

Affidavit of Service by Mail attached.

[Endorsed]: Filed July 21, 1951.

In the United States District Court, District of
Montana, Helena Division

No. 521

CHARLES R. NEIBAUER,

Petitioner,

vs.

CAPTAIN MAX R. HARRIS, Commanding Of-
ficer, Montana Induction Center, Butte, Mon-
tana,

Respondent.

TRANSCRIPT OF HEARING ON PETITION
FOR WRIT OF HABEAS CORPUS

Heard by the Honorable W. D. Murray, United
States District Judge for the District of Mon-
tana, at Helena, Montana, June 19, 1951.

Be It Remembered, the above matter came on
for hearing before the Honorable W. D. Murray,

United States District Judge for the District of Montana, sitting without a jury at Helena, Montana, on June 19th, 1951, at 10:00 o'clock a.m. The respondent was present in person and represented by his counsel, R. Lewis Brown, Jr., Esq., Assistant United States Attorney for the District of Montana. Thereupon, the following proceedings were had:

The Court: No. 521, Charles R. Neibauer versus Captain Max R. Harris, hearing on petition for habeas corpus.

Mr. Brown: May it please the Court, counsel for Neibauer doesn't appear to be present. We attempted to contact him yesterday, and we were informed by the girl in his office that he could be contacted either in the Montana Hotel, Kalispell, or the office of—I forget the name of the attorney. Anyhow, we called the Montana Hotel. He didn't have a reservation there and wasn't registered there, and we called the office of the attorney, the number of which his girl had given us. He wasn't there and wasn't expected there.

The Court: What is the situation with reference to the petitioner, is he in the custody of the Army?

Mr. Brown: No, your Honor, he is not, he is home now.

The Court: Is he in the Army?

Mr. Brown: No, he had been found acceptable for service, but had not been inducted.

The Court: What is the situation then?

Mr. Brown: The situation apparently was Mr. O'Connell called up Captain Harris and told him he was going to get a stay of induction. As a result, Captain Harris asked Neibauer to remain in Butte

another 24 hours and see what happened. O'Connell called me up and told me he was going to get a writ of habeas corpus and was coming over with it. I called Captain Harris and told him that. As a result, he didn't induct Neibauer, and a result, he released Neibauer, and Neibauer went home. It is impossible for the Captain to [2*] produce Neibauer in Court today because he never had custody of him.

The Court: Captain Harris is here?

Mr. Brown: Yes.

The Court: Swear Captain Harris.

CAPTAIN MAX R. HARRIS

called as a witness by the Court, being first duly sworn, testified as follows:

The Court: Take the stand, Captain. You are Captain Harris, Max R. Harris?

A. Yes, sir.

The Court: Are you the commanding officer of the Montana Induction Center at Butte?

A. Yes, sir.

The Court: As such you are in charge of the activities of the Army and the induction of draftees under the Selective Service Act, is that so?

A. Yes, sir.

The Court: Are you acquainted with Charles R. Neibauer?

A. Yes, sir.

The Court: Did he appear at the Induction Center in response to an order?

* Page numbering appearing at foot of page of original Reporter's Transcript of Record.

(Testimony of Captain Max R. Harris.)

A. Yes, sir, I believe he was there Thursday.

The Court: What occurred there, what is the situation? [3]

A. The first thing concerning Neibauer's case brought to my attention was the fact he had prepared a statement protesting his induction, based on the fact, according to his statement, that his case hadn't been properly reviewed by the Local Board. Such matters actually are of no concern to us; that would not have stayed his induction, since a man that is forwarded to us by an order by the Local Board, we have no reason to doubt he has been properly treated. It wasn't until just about an hour prior to the actual induction ceremony that I had any further word on it, at which time I was called by Mr. O'Connell, Mr. Neibauer's attorney, indicating he had been in conference with you, that you were on the bench at the time, that he could not get a writ staying his induction, but as soon as you got off the bench, you indicated that you would issue such a writ; in the meantime, you asked he be not inducted. There was no precedent, and I had nothing in regulations to cover what should have been done in such matters. I wasn't sure such a writ was possible, but under the circumstances, I thought it advisable to postpone his induction for 24 hours to see what came of it. I did call my headquarters at Vancouver, Washington, to ask their advice, but at the time I called, there was no officer present who could advise me upon the matter, so I took it upon myself to postpone his induction

(Testimony of Captain Max R. Harris.)

for 24 hours. I asked Mr. Neibauer to remain in Butte overnight. He had every right to refuse, he could have refused without my [4] being able to stop him. I asked if he wouldn't stay over 24 hours until we heard from this writ, which he did. He was in touch with us all the time. I was called by the United States Attorney's office in Butte, about, as I recall, one o'clock daylight time advising me that a writ had been secured and Mr. O'Connell was on his way to Butte with it to deliver it, so I withheld any further action on inducting Mr. Neibauer until the writ could be served, which it was about six o'clock that evening. At that time, of course, Mr. O'Connell got in touch with Mr. Neibauer and took him away.

The Court: Well, let the record show that the Court did not request the Army to withhold inducting the petitioner. As a matter of fact, the Court was advised that the petitioner had already been inducted and was merely awaiting transfer outside of the state to an army camp. It just wasn't the situation I envisioned at all, and the United States Attorney is directed to prepare an order, and I do order, that the writ be dissolved, the writ heretofore issued be dissolved, and the petition be dismissed. You prepare a proper written order, Mr. Brown, and I'll sign it. That just leaves the situation, Captain Harris that you should proceed with the induction of the petitioner.

Captain Harris: I'll have to get him back first.

The Court: Well, get him back, you have authority to do that, haven't you? [5]

(Testimony of Captain Max R. Harris.)

Captain Harris: I'll have to notify the Local Board. I don't have authority without the Local Board.

The Court: You should notify the Local Board. That is all. Thank you very much. I appreciate your idea of trying to cooperate with me. However, as I say, I didn't understand the situation, and I did not request you not to induct him. As a matter of fact, for example, he asked me if I couldn't order the boy to go home. I said, "No, if he has been inducted, he is under army jurisdiction, and I doubt if Captain Harris would have the authority to order him to go home."

Captain Harris: Only the writ of habeas corpus allowed me to let him go as it was.

The Court: Surely. The writ is dissolved and you can proceed with the induction.

(End of hearing.) [6]

State of Montana,
County of Silver Bow—ss.

I, John J. Parker, certify that I am the Official Court Reporter of the United States District Court for the District of Montana, Helena Division, that as such I reported the hearing on the Petition of Charles R. Neibauer for a Writ of Habeas Corpus, heard by the Honorable W. D. Murray, United States District Judge for the District of Montana, at Helena, Montana, June 19th, 1951, and that the

foregoing is a full, true and correct transcript of the proceedings had at said hearing.

Dated at Butte, Montana, July 25, 1951.

/s/ JOHN J. PARKER,
Official Court Reporter.

[Endorsed]: Filed July 26, 1951.

[Title of District Court and Cause.]

CLERK'S CERTIFICATE

United States of America,
District of Montana—ss.

I, H. H. Walker, Clerk of the United States District Court for the District of Montana, do hereby certify that the annexed papers are the originals filed in Case No. 521, Charles R. Neibauer, Petitioner, vs. Captain Max R. Harris, Commanding Officer, Montana Induction Center, Butte, Montana, Respondent, and designated by the petitioner as the record on appeal in said cause; and I further certify that I transmit herewith, as a part of the record on appeal, the Reporter's Transcript of Record filed July 26, 1951.

Witness my hand and the seal of said Court at Helena, Montana, this 1st day of August, A.D. 1951.

[Seal]: /s/ H. H. WALKER,
Clerk as aforesaid.

[Endorsed]: No. 13043. United States Court of Appeals for the Ninth Circuit. Charles R. Neibauer, Appellant, vs. Captain Max R. Harris, Commanding Officer, Montana Induction Center, Butte, Montana, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Montana.

Filed August 3, 1951.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 13043

CHARLES R. NEIBAUER,

Appellant,

vs.

CAPTAIN MAX R. HARRIS, Commanding Of-
ficer, Montana Induction Center, Butte, Mon-
tana,

Appellee.

STATEMENT OF POINTS

The Appellant in the above-entitled action, through his counsel of record, hereby adopts for his statement of points upon which he intends to rely upon this appeal, the Statement of Points to be relied upon on appeal, heretofore and on the 21st day of July, 1951, filed with the Clerk of the United States District Court for the District of Montana, and served upon Counsel for the Appellee, and certified by the said District Court Clerk to the Clerk of the United States Court of Appeals for the Ninth Circuit, and hereby respectfully requests that said Statement of points be allowed and filed pursuant to Rule 19 of this Court.

Dated this 23rd day of August, 1951.

CHARLES R. NEIBAUER,
Appellant.

By /s/ JERRY J. O'CONNELL,
of Counsel of Record for the
Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed August 27, 1951.

[Title of Court of Appeals and Cause.]

DESIGNATION OF RECORD TO BE PRINTED
FOR USE UPON APPEAL

To Paul P. O'Brien, Esq., Clerk of the United
States Court of Appeals for the Ninth Circuit:

You are hereby requested to print, and the Appellant in the above-entitled cause hereby designates, that portion of the Record of the District Court of the United States for the District of Montana, in said cause heretofore designated by the Appellant, which Designation of Record was filed with the Clerk of the District Court of the United States for the District of Montana on the 21st day of July, 1951, and served upon Counsel for the Appellee, and certified by the said District Court Clerk to the Clerk of the United States Court of Appeals for the Ninth Circuit, as the portions of the said record which are material to the consideration by

this Court of the appeal herein, and as such shall be printed by the Clerk of this Court.

Dated this 23rd day of August, 1951.

CHARLES R. NEIBAUER,
Appellant.

By /s/ JERRY J. O'CONNELL,
of Counsel of Record for the
Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed August 27, 1951.

In the United States District Court, for the District
of Montana, Helena Division

Civil No. 521

CHARLES R. NEIBAUER,

Petitioner,

vs.

CAPTAIN MAX R. HARRIS, Commanding
Officer, Montana Induction Center, Butte,
Montana,

Respondent.

STATEMENT OF POINTS

The Petitioner in the above-entitled cause sets forth the following points on which he intends to rely on his appeal to the United States Court of Appeals for the Ninth Circuit.

The Trial Court erred as follows:

1. In proceeding to hear the above-entitled cause without any regard, and in fact, ignoring the Stipulation entered into and agreed upon by the Counsel for both parties herein, continuing said hearing to a day to be set by the Court, and which Stipulations are permitted under the rules of said Court;

2. In failing or refusing to determine whether Petitioner or his Attorney of record had actual or constructive notice that Stipulation of Counsel was to be disregarded and Hearing proceed as scheduled;

3. In proceeding to hear the above-entitled cause in the absence of Petitioner or his Attorney of record, who relied upon Stipulation theretofore entered between Counsel for both parties, and who had no notice that hearing was to proceed at the time held;

4. In failing, in the furtherance of justice, in a matter involving Petitioner's liberty, to set hearing for another date, where proper hearing with all parties present, could have been had, without prejudice to either party and his rights;

5. In requiring and determining that Petitioner must be a member of the Armed Forces of the United States before Writ of Habeas Corpus will lie;

6. In finding and concluding that Petitioner must be a member of the Armed Forces of the

United States before a Writ of Habeas Corpus will lie;

7. In finding and concluding that Petitioner must be inducted into the Armed Forces of the United States before a Writ of Habeas Corpus will lie;

8. In finding and concluding that the Petitioner herein was not on the date or dates set forth in his Petition for a Writ of Habeas Corpus, restrained of his liberty nor held in custody against his will by the Respondent herein nor by any other representative, or representatives, of the Armed Forces of the United States, or at all;

9. In ordering the dissolution of the Writ of Habeas Corpus, and in dismissing the Petition of the Petitioner for a Writ of Habeas Corpus herein. Dated at Great Falls, Montana, on this 19th day of July, 1951.

/s/ JERRY J. O'CONNELL,
Attorney for Petitioner.

Affidavit of Service by Mail attached.

[Endorsed]: Filed July 21, 1951.

No. 13043

IN THE
United States
Court of Appeals
for the Ninth Circuit

CHARLES R. NEIBAUER,

Appellant,

vs.

CAPTAIN MAX R. HARRIS, Commanding Officer,
Montana Induction Center, Butte, Montana,

Appellee.

APPELLANT'S OPENING BRIEF


APPEAL FROM THE UNITED STATES
DISTRICT COURT, FOR THE
DISTRICT OF MONTANA

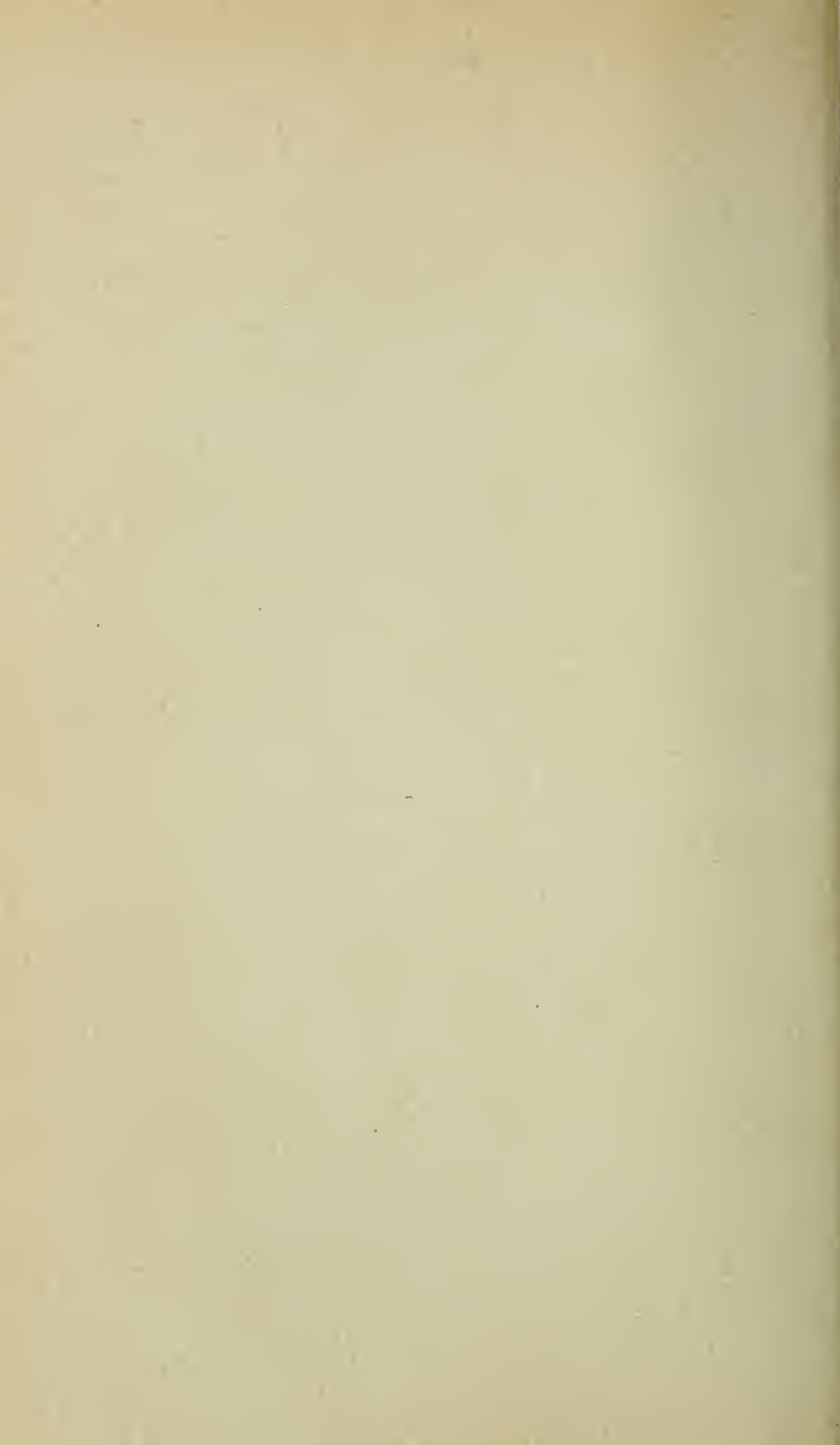
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PAUL F. O'BRIEN
CLERK



IN THE
United States
Court of Appeals
for the Ninth Circuit

CHARLES R. NEIBAUER,

Appellant,

vs.

CAPTAIN MAX R. HARRIS, Commanding Officer,
Montana Induction Center, Butte, Montana,

Appellee.

APPELLANT'S OPENING BRIEF

APPEAL FROM THE UNITED STATES
DISTRICT COURT, FOR THE
DISTRICT OF MONTANA

I N D E X

	Page
Statement of Jurisdiction	2
Statement of Case	3
Questions Involved	5
Specifications of Error	7
Argument:	
(1) Trial Court erred in proceeding to Hearing in face of Stipulation entered into by parties	8
(2) Trial Court erred in failing to determine whether Appellant and Counsel had due and proper notice that Hearing was to proceed	10
(3) Trial Court erred in proceeding to purported Hearing in absence of Appellant and Counsel,	10
(4) Trial Court erred in denying Hearing to Ap- pellant on Writ of Habeas Corpus actually issued by Court	13
(5) Trial Court erred in requiring that Appellant must be member of Armed Forces before Writ would lie	16
(6) Trial Court erred in finding and concluding that Appellant must be member of Armed Forces before Writ would lie	16
(7) Trial Court erred in finding and concluding that Appellant must be inducted into the Armed Forces before writ will lie	16
(8) Trial Court erred in finding and concluding that Appellant was not unlawfully restrained or wrongfully in custody	17
(9) Trial Court erred in dissolving Writ of Habeas Corpus and dismissing Appellant's Petition....	20
Conclusion	20
Appendix	22

CASES CITED

	Page
Billings vs Truesdell, 321 U.S. 546	16, 18
Dorsey vs. Gill, 148 F. 2d 857	13
Dunscombe vs. Smith, 190 So. 796, 139 Fla. 497	10
Estep vs. U.S. 327 U.S. 114-146	16
Ex parte Foster, 71 S.W. 593, 44 Tex. Crim. Rep. 423	19
Ex parte Rosier, 133 F. 2d 316	14
Galpin vs. Page, 18 Wall. 350, 368, 21 L. Ed. 959	15
Gibson vs. U.S., 329 U.S. 338, at 357, 358	16
Japanese Internment Cases (CCA 9th) 156 F. 2d 441	16
Lawrence vs. Yost (CCA 9th) 157 F. 2d 44	16
Maryland Casualty Co. v. Rickenbacker, 146 F. 2d 751	9
O'Keith vs. Johnston, Warden (CCA 9th) 122 F. 2d 554	13
Sanders vs. U.S. (CCA 9th) 154 F. 2d 873, 874	16
U. S. Graham, 57 F.S. 938 at 941	19
Walker vs. Johnson, 312 U.S. 275	13, 14

TEXT BOOKS

25 Am. Jur. 158, Habeas Corpus	19
6 Co. 52	15
4 Bla. Com. 483	15

STATUTES

U.S.C.A., Title 28, Sec. 2241	2
U.S.C.A. Title 28, Sec. 2243	4, 6, 12, 13, 17, 22, 23
U.S.C.A. Title 28, 2253	2
U.S.C.A. Title 50 App, 451 et seq.	2

REGULATIONS

Selective Service Regulations Sec. 1642.2	19, 23
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APPEARANCES:

JERRY J. O'CONNELL,
305 Barber-Lydiard Building,
Great Falls, Montana.
For Petitioner and Appellant.

DALTON PIERSON,
United States Attorney for the District of
Montana,
Federal Building,
Butte, Montana,

R. LEWIS BROWN, Jr.
Asst. United States Attorney for the District of
Montana,
Federal Building,
Butte, Montana,
For Respondent and Appellee.

STATEMENT OF JURISDICTION

The basis for the jurisdiction of the District Court below in the case at bar and the jurisdiction of this Court to review the judgment or order of the lower court from which the Appellant appeals is based on the fact that the Appellant petitioned the court below for a Writ of Habeas Corpus seeking his release from the unlawful custody and restraint, within the District of Montana, of the Appellee, as Commanding Officer of the Montana Induction Center at Butte, Montana, acting under or by color of the authority of the United States, under and by virtue of a void and invalid selective service classification and order of induction, issued to the Appellant under the Selective Service Act of 1948 (50 App. U.S.C.A. 451 et seq.); that such custody and restraint was in violation of the Federal Constitution and the said statute. That the District Court had the power to grant a writ of habeas corpus under such a showing as made in Appellant's Petition for the writ (Tr. 3) is provided by 28 U.S.C.A. 2241.

The Writ having been issued, then discharged and the petition therefor dismissed by the District Court, this Court has jurisdiction on the appeal from the final order of the lower court under the provisions of 28 U.S.C.A. 2253. No certificate of probable cause is required because the detention complained of does not arise out of process issued by a State court.

STATEMENT OF THE CASE

The Appellant herein, Charles R. Neibauer, a registrant under the Selective Service Act of 1948, complied fully with the provisions of that law, the proclamation of the President of the United States promulgated in connection therewith, and the rules and regulations issued thereunder. Originally classified as II-C, entitling him to agricultural deferment, his local board reclassified him as I-A; his right to a personal hearing before the board thereon, despite proper request by himself and his father, was denied; he appealed said classification to the State Appeal board, which affirmed the local board's action without dissenting vote; he exhausted all the remedies provided by the Act; was ordered to report for induction; obeyed said order and reported to the Appellee herein at the Montana Induction Center; was examined as to his physical, moral and social standards, and accepted for service in the armed forces, and exhausted fully all his administrative remedies (Tr. 3-7). Then counsel for the appellant, at his request and direction, petitioned the lower court for a Writ of Habeas Corpus, which was issued and directed to the Appellee herein before Appellant's actual induction into the armed services. (Tr. 25). The writ was returnable on June 19, 1951. (Tr. 9-10).

Because the lower court was then engaged in a jury term, with a crowded calendar, and was prepared to leave immediately upon completion thereof, for the Judicial Conference of the Ninth Circuit,

and at the Court's suggestion and advice, counsel for the Petitioner contacted the United States Attorney, Dalton Pierson, Esq., counsel for the Appellee, and counsel for both parties entered into a stipulation in writing, signed by respective counsel, and filed with the Clerk of the lower court on the 18th day of June, 1951, to continue the hearing from the date scheduled to a day to be set by the Court. (Tr. 11).

Appellant's counsel relied completely on the said Stipulation, and proceeded to transact legal business in another part of the District considerably removed from the seat of the Court and his office. The Appellee **made** no formal return, as required by law (28 U.S.C.A. 2243). Altho some slight endeavor was made to contact appellant's counsel, without any actual or constructive notice to the appellant or his counsel, on the 19th day of June 1951, the Court proceeded to conduct an alleged hearing on the return of the Writ, called the Appellee as the Court's witness (sic), and without the presence of either appellant or his counsel, conducted the entire examination of the Appellee, while counsel for the Appellee sat there. Altho the Stipulation cited above was in the file and records before the court, and counsel for the Appellee had signed such stipulation, no mention was made of it, by either the court or Appellee's counsel. The latter did not call the Court's attention to it, nor did he make any motion to set it aside or modify it. Appellee testified that the Appellant had reported for induction; that he was notified by Ap-

pellant's counsel that a Writ had been applied for; that he postponed Appellant's actual induction for 24 hours; that the Writ was served on him the following day, and he did not therefore induct Petitioner. (Tr. 23, 24, 25). At the conclusion of the alleged hearing, the Court announced that the Writ of habeas corpus was discharged and the Petition of Appellant was dismissed, (Tr. 22, 23, 24, 25). The court made and entered its formal written Order on June 20, 1951. (Tr. 12, 13).

The lower court's order found and concluded:

“that the petitioner was not, and is not now, a member of the Armed Forces of the United States and was not inducted into the Armed Forces of the United States, and it further appearing that the Petitioner herein was not on the date, or dates, set forth in his Petition for Writ of Habeas Corpus restrained of his liberty nor held in custody against his will by the respondent, Capt. Max R. Harris, nor by any other representative, or representatives, of the Armed Forces of the United States, or at all -----” (Tr. 12).

Before the Appellant or his counsel could seek appropriate redress in the lower court, the court departed the district for the aforesaid Judicial Conference. Appellant then appealed to this Court from the Judgment or final order of the court below, on June 22, 1951. (Tr. 14).

QUESTIONS INVOLVED

1. Did the Court err in ignoring the Stipulation entered into between Counsel for both parties, reduced to writing and filed with the Clerk?

2. Did the Court err in proceeding to Hearing without actual or constructive notice to Appellant, in the face of the Stipulation, without seasonable affirmative application upon the part of Appellee to set it aside or modify it?

3. Did the court accord the Appellant due process of law, as provided by the Fifth and Fourteenth Amendments to the Federal Constitution and the statute (28 U.S.C.A. 2243) in denying Appellant his right to traverse Appellee's return, and to be heard on the issues of fact and law?

4. Did the court err in dissolving the writ and dismissing the Petition based on his finding and conclusion that Appellant was not a member of the Armed Forces of the United States, and had not been inducted into the military services?

5. Did the court err in his final order dissolving the Writ and dismissing the Petition based on his finding and conclusion, entered without Appellant's traverse to the return on the writ, and without hearing the Appellant's testimony and evidence on the allegations of his Petition which did allege unlawful restraint and custody, that the Appellant was not on the date or dates set forth in his Petition restrained of his liberty nor held in custody against his will by the Appellee, nor any other representative, or representatives, of the armed forces of the United States, or at all?

SPECIFICATION OF ERRORS—STATEMENT OF POINTS

From the final order of the lower court dissolving the Writ of Habeas Corpus issued by the court, and dismissing the Petition of the Appellant therefor, the Appellant, Petitioner below, appeals and specifies as error:

1. The trial court erred in proceeding to hear the above-entitled cause without any regard, and in fact, ignoring the Stipulation entered into and agreed upon by the Counsel for both parties herein, continuing said hearing to a day to be set by the Court, and which Stipulations are permitted under the rules of said Court; (Tr. 11, 22, 23).

2. The trial court erred in failing or refusing to determine whether Petitioner or his Attorney of record had actual or constructive notice that Stipulation of Counsel was to be disregarded and Hearing proceed as scheduled; (Tr. 22, 23).

3. The trial court erred in proceeding to hear the above-entitled cause in the absence of Petitioner or his Attorney of record, who relied upon Stipulation theretofore entered between Counsel for both parties, and who had no notice that hearing was to proceed at the time held; (Tr. 22, 23, 24, 25, 26).

4. The trial court erred in failing, in the furtherance of justice, in a matter involving Petitioner's liberty, to set hearing for another date, where proper hearing with all parties present, could have been had, without prejudice to either party and his rights; (Tr. 22).

5. The trial court erred in requiring and determining that Petitioner must be a member of the Armed Forces of the United States before Writ of Habeas Corpus will lie; (Tr. 12,13).

6. The trial court erred in finding and concluding that Petitioner must be a member of the Armed Forces of the United States before a Writ of Habeas Corpus will lie; (Tr. 12, 13).

7. The trial court erred in finding and concluding that Petitioner must be inducted into the Armed Forces of the United States before a Writ of Habeas Corpus will lie; (Tr. 12, 13).

8. The trial court erred in finding and concluding that the Petitioner herein was not on the date or dates set forth in his Petition for a Writ of Habeas Corpus, restrained of his liberty nor held in custody against his will by the Respondent herein nor by any other representative, or representatives, of the Armed Forces of the United States, or at all; (Tr. 12,13).

9. The trial court erred in ordering the dissolution of the Writ of Habeas Corpus, and in dismissing the Petition of the Petitioner for a Writ of Habeas Corpus herein. (Tr. 13).

ARGUMENT

With reference to the first error specified by Appellant, the record discloses an attitude upon the part of the Court and the counsel for the Appellee, which was undeterred by even ordinary considerations of

due process, and the requirements of dealing in good faith.

At the Court's own suggestion, Counsel for the Appellant and the Appellee entered into a Stipulation (Tr. 11) whereby they agreed that the Hearing set by the Court for the 19th day of June, 1951, was to be continued until a day to be set by the Court. That Stipulation was reduced to writing, signed by both parties, and filed with the Clerk of the Court below, on the 18th day of June, 1951. It was not a Stipulation as to the law in the case, or as to legal effects of the facts in the case, such as are not ordinarily permitted. Nevertheless, the Court and Counsel for the Appellee, both of whom knew that the Stipulation was filed and was in the record in the case, did not mention it, did not move to set it aside or modify, but completely ignored, disregarded and evaded it. (Tr. 22).

If the Court, who had advised Counsel for Appellant to seek an agreement, later changed its mind, or Counsel for the Appellee changed his mind, then the proper thing to do was to give Appellant proper notice that the Stipulation would not be honored but breached. Appellant will not belabor this tribunal with extended argument, but cites as authority the words of the Court of Appeals for the Fourth Circuit in the case of **Maryland Casualty Co. vs. Rickenbacker et al**, 146 F. 2d 751, to-wit:

“Stipulations of attorneys made during a trial may not be disregarded.”

Another case, where the Supreme Court of the State of Florida considered a similar situation, where counsel who desired relief against previous stipulation, had ignored and evaded the agreement entered into with opposing counsel, emphasizes the proper course which Appellee, and the Court here, should have pursued:

“To obtain relief against stipulation, the regular course is not to ignore or attempt to evade it, but to make seasonable affirmative application to the Court by formal motion **on notice** and supported by affidavits for withdrawal or revocation.”

Dunscombe v. Smith, 1950 So. 796, 139 Fla. (Emphasis supplied).

Appellant submits, therefore, that the trial court erred as pointed out in his Specification No. 1, and the action of the Court in completely ignoring and disregarding the Stipulation, constituted manifest abuse, and prejudiced substantial rights of the Appellant as Petitioner below.

As to Specifications 2 and 3, Appellant merely calls the Court's attention to the Transcript of the Record, Pages 22 and 23. On Page 22 thereof the lower court calls the case, and Counsel for the Appellee, who on just the day previous had entered into and signed and filed with the Clerk of the lower court the Stipulation here involved, blandly notifies the Judge that, and I quote, from the transcript at that page:

“Counsel for Neibauer (Appellant herein) doesn't appear to be present. We attempted to contact him yesterday, and we were informed by the girl in his office that he could be contacted either in the Mon-

tana Hotel, Kalispell, or the office of—I forgot the name of the attorney. Any how, we called the Montana Hotel. He didn't have a reservation there and wasn't registered there, and we called the office of the attorney, the number of which his girl had given us. He wasn't there and wasn't expected there."

Here there is no mention of the Stipulation; no attempt to set it aside; no explanation of why Counsel for the Appellee was attempting to contact Counsel for Neibauer; no notification to the girl in the Counsel's office why they were attempting to contact him; no notification even to her that the Stipulation was going to be disregarded and the hearing proceed as set. Certainly, no word or action from the Court on the Stipulation; and no attempt or attitude at even the slightest protection and preservation of the Appellant's rights and liberty of person which were at stake, and which would have been consonant with the sacred tradition which clothes the historic Writ of Habeas Corpus. Notwithstanding the agreement made and signed, notwithstanding that Appellant and his counsel had no notice, Counsel for the Appellee had the latter present in court, evidently with full pre-arrangement, and proceeds to notify the court that he is present, and the Court, not counsel for the Appellee, calls the Respondent (Appellee herein) or its witness, and proceeds to examine him while Counsel for Appellee sits almost as a spectator. There was naturally no cross examination, and Appellee's testimony was apparently swallowed whole. There was no formal return made by Appellee to the Writ as

required by statute (28 U.S.C.A. 2243), and the Court did not inquire into it, but presumably considered the Appellee's testimony as an informal return. It must be remembered here that the lower court did not issue an order to show cause to the Appellee why Petitioner's writ should not be granted, but the Court had actually issued a writ of Habeas Corpus directed at the Appellee, and Section 2243, Title 28 U.S.C.A. (See Appendix) delineates the procedure to be followed from thenceforth. Its provisions, following the issuance of the Writ, were not complied with by the Appellee or the lower court. In a few seconds, or minutes at most, Appellant's Writ was dissolved, his petition dismissed, and his liberty and freedom, which the Writ so jealously protects, taken away on the most scanty and vague testimony of only one party to the action. This we contend is reversible error.

We further insist that opposing counsel's completely inadequate attempt to contact this counsel does not constitute notice of any kind that the stipulation was to be brushed aside or ignored and the hearing proceed. The distances in the District of Montana, as this court well knows, are vast, and to call one hotel and one attorney's office in a town once, while counsel could have been on his way during a 250 mile trip and consider this sufficient to ignore the Stipulation made, falls far short of the notice required under the circumstances and the issues involved.

On Specification No. 4, Appellant herein lays great stress. It is here we contend that the court below failed to accord Appellant that due process of law required by the Fifth and Fourteenth Amendments to the Constitution of the United States, and commanded by the statute (28 U.S.C.A. 2243). The United States Supreme Court in the leading case on this subject, **Walker vs. Johnston**, 312 U. S. 275 has spoken out clearly in this regard. If the Appellee, Captain Harris' testimony at the purported hearing held by the lower court is to be considered, it constitutes a verbal, informal return to the writ which the court duly and properly issued, but it serves only to make the issues which must be resolved by evidence taken in the usual way. It can have no other office. He should be subjected to examination ore tenus or by deposition as are all other witnesses. On the basis of Appellant's Petition for the writ alleging unlawful restraint and custody by the Appellee, and on the record, it was Appellant's right to be heard. In **Walker vs. Johnston**, *supra*, the Supreme Court said:

"The only admissible practice,, was to have the Petitioner produced, and hold a hearing at which evidence is received. Nothing less will satisfy the command of the statute, (28 U. S. C. A. 2243) that the court shall hear and determine the facts."

This Court has expounded the same doctrine in **O'Keith vs Johnston, Warden**, (CCA 9th) 122 F. 2d 554, and it has also been followed in **Dorsey v. Gill**, 148 F. 2d 857.

Perhaps the case closest in point is that of **Ex parte Rosier**, 133 F. 2d 316, decided by the District of Columbia Court of Appeals. There the Court in summarizing *Walker vs. Johnston*, *supra*, stated:

“(1) A Petitioner cannot be denied the opportunity to prove the truth of the allegations he makes, if those allegations if true, entitle him as a matter of law to release from restraint. (2) No controversial issue of fact arising under a Petition for a writ of Habeas Corpus, return and traverse can be determined except after a hearing *ore tenus* or upon depositions.

In that case as here, the lower court accepted the testimony of the Respondent and denied the Petitioner's writ without a hearing, and the appellate court condemned such action in the strongest language as having done violence to the nature of the writ historically and as not in consonance with our jurisprudence and with the due process clause of the Fifth Amendment to the Constitution. It said:

“The right of hearing under the due process clause includes the right of each party to a cause to introduce evidence in support of his claim or defense, to hear the evidence introduced against him, to test the same by cross-examination, the right that nothing shall be treated as evidence which is not introduced as such, and the right to make argument on questions of both law and fact.”

In an early case, the United States Supreme Court, in deciding an appeal similar to the one before us, condemned in bitter tones the denial of hearing and due process to the Petitioner as here:

“It is a rule as old as the law, that no one shall be personally bound until he has had his day in court, by which is meant, until he has been duly cited to appear, and has been afforded an opportunity to be heard. **Judgment without such citation and opportunity wants all the attributes of a judicial determination; it is judicial usurpation and oppression and can never be upheld where justice is justly administered.**”

(Emphasis supplied.)

Galpin v. Page, 18 Wall. 350, 368
21 L. Ed. 959

It is the contention of Appellant that the trial court erred in failing to accord the Appellant a hearing in respect to the allegations of his Petition. He was given no opportunity to traverse the assertions of the Respondent. He was not even apprized of them. But the Appellant's Petition and the Appellee's testimony in the alleged hearing held by the lower court, considered together, raised issues of facts, that should under the statute be determined by the court after hearing. The determination actually reached by the court below was reached without a proper hearing or no hearing at all. The necessity for hearing cannot be escaped under the law of the land.

“He who decides anything, one party being unheard, though he should decide right, does wrong.”

6 Co. 52; 4 Bla. Com. 483 (Emphasis supplied.)

We submit therefore that Appellant herein was denied due process of law under the federal constitution and the statute applicable, and the judgment of the lower court should be reversed and remanded for proper hearing and procedure.

Appellant combines his argument under Specifications of error Nos. 5, 6, and 7. It should be made clear, because the lower court was apparently confused on this point, that Appellant's Writ of Habeas Corpus was directed at the Appellee, not in his **military** role as an officer of the United States Armed Forces, but in his **civil** role in the administration of selective service, which is a system integrating both the civil and military authorities, and the latter perform a civil function therein:

Billings vs Truesdell, 321 U. S. 546

It is now clearly settled law that actual induction into the armed forces of the United States is not required before habeas corpus will lie, as the United States Supreme Court and this Court have pointed out time and time again:

Estep vs. U. S. 327 U. S. 114-146,

See particularly the concurring opinions of Justices Murphy and Rutledge.

Gibson vs. U. S. 329 U. S. 338 at 357, 358

Sanders vs. U. S. (CCA 9th) 154 F. 2d. 873, 874

Japanese Internment Cases, (CCA 9th) 156 F. 2d 441

Lawrence vs. Yost (CCA 9th) 157 F. 2d 44

The Appellant here had exhausted his administrative remedies; he had reported to the Induction center (Tr. 22, 23, 24), had been accepted by the military, (Tr. 22) but had not actually been inducted (Tr. 25.)

We submit therefore that it was not necessary for the Appellant to be a member of the Armed Forces, or to have been inducted into the Armed Forces in

order for a writ to lie, and to be directed at the Appellee in his civilian role in the selective service administration, and that the court below erred in finding and concluding to the contrary. We insist that such error was prejudicial and constitutes grounds for reversal.

On Specification of error No. 8, the trial court erred in finding and concluding that the Appellant was not on the date or dates set forth in his Petition for a Writ of Habeas Corpus, restrained of his liberty nor held in custody against his will by the Appellee, nor by any other representative, or representatives of the Armed Forces of the United States, or at all. Appellant's Petition for the Writ did affirmatively allege that the Appellee was wrongfully restraining appellant of his liberty and holding him in wrongful custody at the date alleged in the petition (Tr. 7). Appellee attempts to controvert this at the alleged hearing held. (Tr. 25) This of course merely puts the fact at issue, and Appellant under Section 2243, 28 U. S. C. A. was entitled to deny any of the facts set forth in this testimony or allege any other material facts, if the lower court had not erroneously dissolved the writ and dismissed the petition, and denied Appellant his rightful hearing.

As pointed out before, the lower court was apparently confused and had the impression that Appellant pursued his writ in order to remove himself from the military jurisdiction and control of the Appellee. Appellant was not a member of the Armed Forces and

he had not been inducted into the Armed Forces and he did not want to be. This was expressly what he was trying to prevent because of his invalid classification and void order for induction. He directed his writ at the Appellee in the civil role which the Appellee was playing in the integrated administrative process of selective service, and the unlawful, wrongful restraint, control and custody of the Appellant while performing that civil function, and at the same time Appellant remained in the **civil jurisdiction** of his local selective service board, and would not come under military jurisdiction until actually inducted into the Armed Forces voluntarily. *Billings vs. Truesdell*, 321 U. S. 542.

That Appellant was actually restrained of his liberty is evidenced clearly by the last sentence of testimony of the Appellee in the abortive hearing held in the lower court:

“Captain Harris: Only the writ of habeas corpus allowed me to let him go at it was. (Tr. 26.)

Appellant was compelled to report to the Appellee, as Commanding officer of the Induction Center, by process issued in the name of the President of the United States. He could only refuse to obey under compulsion of committing a crime against the federal government. If the lower court had not issued its writ, he would have been compelled to go into the military service, or commit a crime by refusing to do so. Altho Appellee permitted him to go home, largely because he had no place to imprison him, he had no

right to do so. He is enlarged now solely by virtue of the Stay of Execution granted by another District Judge of the District of Montana, pending this appeal. (Tr. 16) His order to report for induction, under Selective Service Regulations is a continuing order from day to day. (Selective Service Regulation Sec. 1642.2) It is inoperative only because of the Stay of Execution. The restraint here of the Appellant was sufficient to warrant issuance of the writ:

U. S. vs. Graham, 57 F. S. 938 at page 941

The restraint here which precluded freedom of action is sufficient notwithstanding the lack of confinement in a jail or prison:

25 Am. Jur. 158, Note 9, cases cited

The restraint of the Appellant was certainly involuntary, and there was a duress or restraint of the Appellant whereby he was prevented from exercising the liberty of going when and where he pleased:

Ex parte Foster, 71 SW 593, 44 Tex. Crim.
Reports 423

The Appellant was compelled to keep in touch with the Appellee at all times; if he refused, he would have committed a crime, and subjected himself to prosecution, conviction, and possible imprisonment.

If the trial court's finding and conclusion is correct, then the opinion of this court and the United States Supreme Court in the Estep, Gibson, Sanders and other cases is nullified and rendered worthless, except for those selective service registrants who exhaust all of their administrative remedy, and then

commit the crime of refusing to be inducted, and are arrested and detained therefor. Certainly this was not the intention of this Court or the Supreme Court; there is sufficient restraint and custody to satisfy the requirements of the writ, when one reports to the induction center, and is under the orders and the custody of the Commanding Officer, and his representatives, in their civil role in that process, and has been accepted for military service, and is subject to induction, or must commit a crime. We contend that the Appellant was sufficiently unlawfully restrained and detained in wrongful custody to entitle him to the issuance of the writ and to release from that unlawful restraint and wrongful custody, and that that restraint was involuntary. We asseverate that the trial court erred in holding to the contrary, and its ruling should be reversed.

Appellants Specification No. 9 is based upon the argument and the authority cited therefor under each and every one of the other eight specifications.

CONCLUSION

This appeal is made in the utmost good faith. The Appellant has suffered a gross injustice at the hands of his local selective service board; the law of the land has been subverted by that board to serve selfish and unconscionable ends, which are not at issue in this appeal, but which should have been heard in the lower court. The action of the lower court in its denial of elementary due process and its incredible flaunting

of the tradition of his great writ; the inexplicable disregard and evasion of Stipulation made between the parties to this action, and on which Appellant relied rightfully; all these were a manifest abuse of discretion and prejudicial and reversible error. The federal courts are held to a much higher order of procedure in taking away a man's liberty than the arbitrary and capricious manner in which the court below dissolved the writ it had issued, and dismissed Appellant's Petition. We submit that the judgment and final order of the lower court should be reversed, and the case remanded to be heard according to the law and in accordance with the decision of this Court.

Respectfully submitted,

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APPENDIX

28 U. S. C. A. 2243. Issuance of writ; return; hearing; decision.

A court, justice, or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto.

The writ, or order to show cause shall be directed to the person having custody of the person detained. It shall be returned within three days unless for good cause additional time, not exceeding twenty days, is allowed.

The person to whom the writ or order is directed shall make a return certifying the true cause of the detention.

When the writ or order is returned a day shall be set for hearing, not more than five days after the return unless for good cause additional time is allowed.

Unless the application for the writ and the return present only issues of law the person to whom the writ is directed shall be required to produce at the hearing the body of the person detained.

The applicant or the person detained may, under oath, deny any of the facts set forth in the return or allege any other material facts.

The return and all suggestions made against it may be amended, by leave of the court, before or after being filed.

The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require. June 25, 1948, c. 646, 62 Stat. 965

Selective Service Regulations, Sec. 1642.2—Continuing duty. When it becomes the duty of a registrant or other person to perform an act or furnish information to a local board or other office or agency of the Selective Service System, the duty or obligation shall be a continuing duty or obligation from day to day and the failure to properly perform the act or the supplying of incorrect or false information shall in no way operate as a waiver of that continuing duty.

**In The United States
Court of Appeals
For the Ninth Circuit**

CHARLES R. NEIBAUER,

Appellant,

vs.

CAPTAIN MAX R. HARRIS,
Commanding Officer,
Montana Induction Center,
Butte, Montana,

Appellee.

Brief of Appellee

On Appeal From the United States District Court
for the District of Montana

DALTON PIERSON,
United States Attorney,
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Butte, Montana,
Attorneys for Appellee

Filed....., 1952

....., Clerk

No. 13043

**In The United States
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ii.

INDEX

INDEX OF SUBJECTS AND LAW POINTS

	Page
Statement of Case.....	1
Argument	5
Conclusion	21

TABLE OF CASES

Baucos v. Riveroll, (1938) 272 Pac. 760.....	7
Billings v. Truesdell, 321 U. S. 542.....	18, 19, 20
Dorsey v. Gill, 148 Fed. (2d) 857.....	12
Dunscombe v. Smith, 190 Southern 796, 139 Fla. 497	6
Estep v. United States, 327 U. S. 114.....	16, 17
ex parte Rosier, 133 Fed. (2d) 316.....	12
Falbo v. United States, 320 U. S. 549.....	17
Hartford Nat. F. Ins. Co. v. Burton, (Ind. App.) 168 N. E. 37.....	7, 8
Jones v. Biddle, 131 Fed. (2d) 853 Cert. den. 318 U. S. 784.....	18
Lawrence v. Yost (CCA 9th) 157 Fed. (2d) 44....	18
Maryland Casualty Company v. Richenbacher, et al, 146 Fed. (2d) 751.....	6
O'Keefe v. Johnston, Warden (CCA 9th) 122 Fed. (2d) 554	2..... 12
United States v. Columbia Steel Company, et al, (1947) 71 Fed. Supp. 734.....	6
Walker v. Johnston, 312 U. S. 275.....	12

INDEX

STATUTES

Title 28 U. S. Code Sec. 2243.....Appendix

REGULATIONS

Selective Service Regulations, 1603.1-1603.8.....Appendix

Selective Service Regulations, 1632. 14(a), 1632.
14(b), 1632. 15(e).....Appendix

TEXT BOOKS

60 Corpus Juris, Sections 19 and 36..... 7

No. 13043

**In The United States
Court of Appeals
For the Ninth Circuit**

CHARLES R. NEIBAUER,

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vs.

CAPTAIN MAX R. HARRIS,

Commanding Officer,

Montana Induction Center,

Butte, Montana.

Appellee.

Brief of Appellee

STATEMENT OF CASE

The Appellant herein, Charles R. Neibauer, a registrant under the Selective Service Act of 1948, appeared at the Armed Forces Induction Station for Montana, at Butte, Montana, on June 14, 1951, in obedience to an order to report for induction on that date, issued by Local Board No. 3, Blaine County, Chinook, Montana, (R. 7. 23).

At the Montana Induction Station the Appellant was examined and found acceptable for service in the Armed

Forces, (R. 7). However, before Appellant could be inducted and before the induction ceremony had begun, his attorney, Jerry J. O'Connell, called the Commander of the Induction Station, Captain Max R. Harris, Appellee herein, by long distance telephone, from Helena, Montana, and represented to Captain Harris that he, O'Connell, was obtaining from the Honorable W. D. Murray, United States District Judge, who was holding Court in Helena, Montana on that day, a *Stay of Induction*, and that the Court had requested that Appellant not be inducted (emphasis supplied), (R. 24). This representation was completely false, (R. 25). Thereupon, no further steps were taken to induct the Appellant into the Armed Forces and he was in fact not inducted into the Armed Forces, (R. 24, 25). He was, however, requested to remain in Butte, and to remain in contact with the Appellee, Captain Harris, which he did, (R. 25).

Mr. O'Connell arrived in Butte on the afternoon of June 15, 1951, armed with a *Writ of Habeas Corpus* (emphasis supplied), (R. 25). It will be noted that Mr. O'Connell misrepresented the nature of the Writ he was obtaining. This misrepresentation enabled Appellant to avoid submitting to induction and not be subject to prosecution since Appellee withheld inducting Appellant in the belief that the Court desired Appellant not be inducted into the Armed Forces prior to issuance of the Writ Staying Induction, (R. 24, 25). After the Writ of Habeas Corpus was served upon the Appellee by a Deputy United States Marshal, counsel for the Appellant contacted Appellant, and they departed together from the Induction Station, (R. 25). At the time Mr. O'Connell

obtained the Writ of Habeas Corpus from the Court in Helena, the 19th of June, 1951, was set as the day when the hearing upon the Writ of Habeas Corpus would be had, (R. 9, 10).

It should be observed at this juncture that Appellant's opening brief alleges that the Court desired that the hearing set for June 19, 1951, be postponed and that at the Court's suggestion counsel for Appellant obtained a stipulation vacating the date of the hearing (Appellant's opening Brief 3, 4 and 9). Such statements are completely unfounded in that there is no basis for them in fact or in the record. They are false and this Court is urged to disregard them. The true facts, which can be substantiated by Affidavit if desired, are that on June 15, 1951 in Helena, Montana, Mr. O'Connell was informed by the Court that the Court desired to have the matter heard on the day set because the Court was leaving afterward to attend a Judicial Conference for the Ninth Circuit, which conference was to be held in California. Despite the Court's express directions, counsel for Appellant, in Helena where the Court was still sitting on the 18th day of June, 1951, completely misrepresented the Court's wishes over the telephone to the United States Attorney, who was in Missoula at the time. The United States Attorney transmitted by telephone this false information to his Assistant in Butte where the stipulation prepared by Mr. O'Connell, which ignored and flouted the Court's express Order and desire to hold the hearing June 19, 1951, was signed by the Assistant United States Attorney. The misrepresentation inducing the signing of this stipulation by the United States Attorney and

by the Assistant United States Attorney was that the Court, since it wished to leave for California, desired that the hearing be put over until a later date to be set by the Court. Had the United States Attorney and the Assistant United States Attorney known the true facts, the stipulation would never have been signed by them. No Order was prepared by counsel for Appellant for the Court to sign vacating the hearing. No Order was ever submitted to the Court to sign vacating the date of hearing in Helena, on June 19, 1951, and no Order was ever agreed to be submitted, or prepared, by the United States Attorney or the Assistant United States Attorney vacating the prior setting of the hearing to be had in Helena, on June 19, 1951. The Court held the hearing on June 19, 1951 as ordered and in accordance with its intentions as expressed to Mr. O'Connell on June 15, 1951.

At the hearing held on that date, it affirmatively appeared that the Appellant had never been inducted into the Armed Forces and was still a civilian and had never been physically restrained against his will by the Appellee herein, Captain Harris. These facts, even now, are undisputed by Appellant. As a result of the showing made in Helena, on June 19, 1951, the Court ordered the petition for Writ of Habeas Corpus dismissed and ordered the Writ of Habeas Corpus dissolved, (R. 12, 13, 25). Counsel for Appellant then later obtained a Stay of Induction from another Judge of the same Court, and then noticed an Appeal to the United States Court of Appeals for the Ninth Circuit to have the action of the Trial Court reviewed, (R. 14, 16 - 18).

ARGUMENT

Appellant's first specification of error is that "The Trial Court erred in proceeding to hear the above-entitled cause without any regard, and in fact, ignoring the Stipulation entered into and agreed upon by the Counsel for both parties herein, continuing said hearing to a day to be set by the Court, and which Stipulations are permitted under the rules of said Court; (Tr. 11, 22, 23)." (Br. Appellant 7.) With reference to Appellant's first specification, the Record clearly discloses that the error, if any, was committed by Appellant's counsel in disregarding the explicit instructions of the Court that the hearing would be held in Helena on June 19, 1951 (R. 9, 10), in misrepresenting the true state of affairs to the United States Attorney and to his assistant, and in relying upon a stipulation attempting to regulate the Court's conduct, without first ascertaining whether the Court approved such stipulation and would be bound by such stipulation.

It should be borne in mind that the present case is one in which a stipulation was filed attempting to regulate the conduct of the Court in that it purported to vacate a hearing set by the Court, and that no approval by the Court of the stipulation was ever sought or obtained by either side. It is not a case where counsel for one side or the other attempted to avoid a stipulation freely and voluntarily entered into with full knowledge of all facts, nor is it a case in which the Court refuses to honor a stipulation which should be binding on the Court in that permissible subject matter was stipulated by both parties

who were in full possession of all facts. This case, rather, is one in which counsel for Appellant through misrepresentation of fact to counsel for Appellee attempted to evade the Court's express directions to counsel for both sides as manifested in a Court order (R. 9, 10), and to nullify the said Court order without obtaining approval of the Court. This is not a situation as suggested by counsel for Appellant where the Court later changed his mind, or where counsel for Appellee attempted to evade an agreed stipulation, but instead this is a situation in which counsel for Appellant was unsuccessful in an attempt to perpetrate a fraud and trick upon the Court.

While it is true that language in the cases cited by Appellant in his opening brief, pages 9, 10, is to the effect that stipulations of attorneys made during a trial may not be disregarded, a distinction should be made between stipulations of fact made during the course of a trial or other stipulations which do not unreasonably interfere with the course of conduct that a court might, and should, pursue, and the present situation. The case of *Maryland Casualty Company v. Richenbacher, et al.*, 146 Fed. (2d) 751, cited by counsel for Appellant, in his opening brief at page 9, which involved a stipulation of fact made during the course of a trial, is clearly distinguishable from the present case. The case of *Duncombe v. Smith*, 190 Southern 796, 139 Fla. 497, cited by counsel for Appellant in his brief on page 10, involved a situation where counsel on one side desired relief from a previous stipulation. Again, this is not the situation here. In *United States v. Columbia Steel Company, et al.*,

(1947) 71 Fed. Supp. 734, a stipulation was filed, which if binding on the Court, would have limited the terms and the extent of any preliminary injunction which the Court might grant in the case. The Court, in disposing of the contention that the stipulation, which was not approved by the Court, was binding upon the Court in that it could restrict the acts of the Court, had this to say,

"The 'stipulation' itself, being merely the ex parte action of the defendant, would be ineffective unless it was approved by the Court and its terms expressly or tacitly adopted by the Court and the defendant required to comply therewith." 71 Fed. Supp. at Page 736.

It was held in the case of *Baucos v. Riveroll* (1938) 272 Pac. 760, that the action of a court in disregarding a stipulation entered into between parties to an action is a discretionary matter and that its action in so doing would be disturbed on appeal only when it clearly appeared that the order was the result of an abuse of discretion. The rule would seem to be, then, that in matters relating to the individual rights and obligations of the parties among themselves and in matters pertaining solely to questions of fact, stipulations entered into between the parties will be honored by the Court and will be binding on the Court. However, in a matter affecting the power of the Court to act, stipulations entered into between the parties will not be binding upon the Court unless approved by the Court. See generally 60 *Corpus Juris* Sections 19, 36. In *Hartford Nat. F. Ins. Co. v. Burton*, (Ind. App.) 168 N. E. 37, it was said:

“Orders of the Court are not made alone for the convenience of the litigants to be set aside by them at their own behest and to satisfy their own caprice, without regard to the interruption of the Court which their action may occasion, but are made as well for the expedition of the proceedings of the Court, and are not to be modified or annulled except by the knowledge and consent of the Court.”

In the *Hartford* case, an agreement between the parties to hold in abeyance an order of the Court and for which approval of the Court was not secured, was held to be improper.

The value of the Writ of Habeas Corpus rests in the fact that the Court will hear and promptly act upon a petitioner's claim that he is being unjustly and illegally restrained of his liberty. In view of the important role that a speedy hearing under a Writ of Habeas Corpus plays in the due and orderly administration of justice, it would seem to be axiomatic that an *ex parte* stipulation entered into by the parties to the action could not be binding upon a Court without its consent in determining when to hold a hearing on the Writ of Habeas Corpus. The Court should not be forced to countenance delaying tactics without its approval in a matter so fundamental and of such vital importance as a hearing on a Writ of Habeas Corpus. Appellant should not be heard to complain therefore, that the stipulation was ignored in view of the fact that the stipulation was never approved by the Court and in fact was expressly disapproved by the Court before it was submitted, in that the Court had informed counsel for Appellant that the Court desired the matter heard on the 19th of June, 1951, and had so

ordered (R. 9, 10). Certainly then Appellant assumed the risk that his stipulation would not be honored when he failed to appear in Helena on June 19, 1951, in view of the fact that he had not obtained Court approval of his stipulation and knew the Court desired the matter to be heard when and as ordered by the Court on June 15, 1951. It is urged that the error, if any, is Appellant's, since he assumed the risk of failing to be present in Helena on June 19, 1951, and cannot be imputed to the Court or Appellee. Counsel for Appellant should not be permitted to profit by his scheming at the expense of the administration of justice.

Appellant's second specification of error is that the Trial Court erred in failing or refusing to determine whether the petitioner or his attorney of record had actual or constructive notice that the stipulation of counsel filed in the case was to be disregarded and the hearing proceed as scheduled, (Br. Appellant, page 7). Appellant's attorney of course had notice that the hearing would proceed as scheduled because no Order was ever entered vacating the hearing to be held in Helena, on June 19, 1951, and counsel for Appellant well knew this fact in view of the fact that counsel for Appellant prepared the stipulation and did not prepare any Order, nor was any agreement made with the United States Attorney or the Assistant United States Attorney, that an Order be prepared and submitted to the Court to be signed. Counsel for Appellant further had notice that the hearing would be held, because he had been told by the Court on June 15th, that the Court desired the hearing to be held on the 19th day of June, 1951, before

the Court left for California, since if it were not held on that date, the Court could not hear the petition until the Court returned from a Judicial Conference in California. In view of these considerations, it is difficult to see how counsel for Appellant could have relied on the said stipulation and gone about his business without first ascertaining whether the Court approved vacating the hearing which had been set for June 19, 1951.

With reference to Appellant's specification of error No. 3, it is submitted that the Trial Court did not err in proceeding to hear the above cause in the absence of the petitioner and his attorney of record, who relied on the stipulation entered into between counsel for both sides, because the attorney for petitioner knew that the Court desired the hearing to be held in Helena on June 19, 1951. The attorney for petitioner knew that no Order had been signed by the Court approving this stipulation which was on file and the attorney for Appellant had no reason to believe that the Court would approve the stipulation in face of the Court's order and explicit directions to petitioner that the hearing would be held on June 19, 1951, (R. 9). If Appellant was hurt by relying upon a stipulation secured through misrepresentation and in direct disregard of the Court Order (R. 9), the error is not the Court's and is not the error of counsel for Appellee, but is rather that of counsel for Appellant.

Despite the scheming of counsel for Appellant, an attempt, in good faith, was made to locate counsel for Appellant. His office was called long distance by the office of the United States Attorney, and the girl in his office was informed that it was of vital importance that

the United States Attorney get in contact with counsel for Appellant. She informed the counsel for Appellee that counsel for Appellant had gone to Kalispell and that he could be reached at either the Montana Hotel in Kalispell, or the office of an attorney in Kalispell, whose name was given to the United States Attorney. Both the Montana Hotel in Kalispell and the office of the attorney in Kalispell were called, both establishments in Kalispell informed the office of the United States Attorney that counsel for Appellant was not there and was not expected. It was further stated that counsel for Appellant had no reservation at the Montana Hotel, (R. 22). As counsel for Appellant has stated in his brief, page 12, "The distances in the District of Montana are vast," and when one goes from one town to another, especially on a trip of "250 miles," one does not leave on such a trip without informing those whom he intends to visit that he is coming, and without obtaining a reservation in the hotel there. Therefore when counsel for Appellee were informed that counsel for Appellant was not expected in Kalispell, and had no reservation at the Montana Hotel in Kalispell, counsel for Appellee had no other choice but to assume that counsel for Appellant could not be located in Kalispell. Counsel for Appellee had no notice and knew of no other place where counsel for Appellant could be located. Everything was done which could be done to locate counsel for Appellant. Again it is strongly urged that Appellant assumed the risk that the hearing would proceed as ordered and if Appellant and his counsel, relying upon a fraudulently secured stipulation, chose not to be in Helena on June 19,

1951, they are responsible for their actions. The fault cannot fairly be attributed to the Court or Appellee if Appellant gambles and loses.

Appellant's specification of error No. 4 urges that the Trial Court erred in failing to set the hearing on petitioner's Writ of Habeas Corpus for another date when a proper hearing with all persons present could have been had, without prejudice to either party and his rights. In support of his contention, Appellant cites the cases of *Walker v. Johnston*, 312 U. S. 275; *O'Keefe v. Johnston, Warden* (CCA 9th), 122 Fed. (2d) 554; *Dorsey v. Gill*, 148 Fed. (2d) 857, and *ex parte Rosier*, 133 Fed. (2d) 316. The rule of these cases, that a petitioner in a Habeas Corpus proceeding is entitled to be present and present testimony on controverted issues of fact, is undoubtedly proper and correct. However, these cases can hardly be applied to the situation here for the reason that they all stand for the proposition that a petitioner cannot be denied the *opportunity* to prove the truth of the allegations he makes, if controverted. The situation here is much different in that the Appellant has not been denied an opportunity to prove his allegations, but he simply failed to take advantage of the opportunity allowed him by the Court. A hearing was set by the Court for the 19th of June, 1951 of which Appellant had ample notice. Since he was not restrained of his liberty, Appellant could have attended the hearing if he wished, (R. 25). However, Appellant chose to rely upon the stipulation which had been fraudulently obtained by his counsel. In view of the fact that the stipulation was not approved by the Court, and that counsel for Appellant was in possession

of facts from which he well knew that the stipulation would not be approved by the Court, it would seem that Appellant in failing to appear in Helena on June 19, 1951, had assumed the risk that the stipulation would not be approved and therefore cannot be heard to complain that he was denied an opportunity to present evidence. The Record shows not a denial of the right to appear, but instead a failure to take advantage of the right through unjustified reliance on a stipulation unfairly obtained. It is clear, therefore, that the Appellant was not denied the opportunity to be present at the hearing and was not denied an opportunity to present evidence.

Furthermore, Appellant has not been harmed by his failure to appear at the hearing in Helena on June 19, 1951, because, as a reading of the Record will disclose, no controversial issue of fact has been developed in this case. A careful reading of petitioner's petition for Writ of Habeas Corpus (R. 3, 4, 5, 6, 7, 8) shows that the petition for Writ of Habeas Corpus was designed for one purpose, and that purpose was to test the validity of the Local Board's action under which Neibauer, the Appellant herein, was classified 1A, and under which he was ordered to report for induction in Butte, Montana. The petition, read as a whole, shows clearly that it was not intended to allege, and does not, in fact, allege that Captain Harris, Appellee herein, at any time actually or physically restrained Appellant of his liberty. Appellant's petition on its face shows that the only restraint urged by Appellant was that he was restrained under and by virtue of the order issued by his Local Board. The facts alleged by Appellant were not controverted by

any of the facts developed at the hearing held in Helena on June 19, 1951.

The hearing held there brought out, as alleged by petitioner, that he had arrived at the induction station in Butte, Montana pursuant to an order of his Local Board and that he had been examined and found acceptable for service in the Armed Forces of the United States. It was further shown that Appellant was not inducted into and is not a member of the Armed Forces (R. 24, 25). These facts which were developed at the hearing in Helena are entirely consistent with petitioner's petition for Writ of Habeas Corpus. Of course, no facts were developed regarding the validity of Appellant's draft classification by his Local Board and that issue was never reached because the petition on its face and the uncontroverted facts developed at the hearing, showed that the Appellant was not entitled to relief since a Writ of Habeas Corpus will not lie before induction and in any event the petitioner had not charged as respondents the Local Board members in whom his custody was vested by virtue of their order to report for induction. The Record plainly shows that the only issue in this matter was one of law and, of course, that being so it was not necessary for the Appellant to be present. See Title 28 U. S. Code, Sec. 2243 (printed in appendix). It is worthy of note that nowhere in his argument does counsel for Appellant suggest or urge that Appellant should have been produced at the hearing in Helena by Appellee. This, of course, recognizes the true fact as disclosed in the Record that Appellee herein did not have custody of the Appellant at any time and could not have produced the Appellant

at any hearing to be held anywhere (R. 25). The conclusion seems inescapable that, if Appellant failed to be in Helena on June 19, 1951, in accordance with the terms of the Order issued by the Court on June 15, 1951, the blame, if any, rests upon Appellant himself and not upon the Court or Appellee or counsel for Appellee. Counsel for Appellant was in full knowledge of all the facts, and if he relied upon the stipulation, Appellant and his counsel should be held to have assumed the risk that the stipulation would not be honored.

Appellant's specifications of error numbered 5, 6 and 7 indicate a basic confusion as to the Court's order dissolving the Writ (R. 12, 13). The order of the Court below can be supported upon two bases: (1) That a Writ of Habeas Corpus to test the validity of one's Selective Service classification will not lie prior to induction into the Armed Forces, and (2) assuming that a Writ of Habeas Corpus prior to induction will lie, in this case the petition for Writ of Habeas Corpus and the Writ were improper because directed at Appellee, rather than at the members of Appellant's Local Board in whose custody he was while acting under their order to report for induction. As a result of his confusion, Counsel for Appellant has failed to preserve for this appeal the second proposition upon which the lower Court's action can be sustained, and has only preserved for appeal the issue of whether a Writ of Habeas Corpus will lie in these circumstances prior to induction. He has not preserved the issue of whether the Local Board members must be named as respondents before the Writ will issue. It should be noted in this connection that Appellant in his opening

brief at pages 16, 17, 18, argues different error from that specified in his specifications of error numbered 5, 6, 7, (R. 32, 33). Appellant argues that the Writ of Habeas Corpus was directed at Appellee in his civil capacity in the Selective Service System and that the Court below was confused and erred in finding and concluding that a Writ of Habeas Corpus would not lie prior to induction and *could not be directed at Appellee in his civilian role in the Selective Service System* (emphasis supplied) (Br. Appellant 17). The Court will note that there is no specification of error in the record which will permit this issue to be argued by Appellant and it is urged that all of Appellant's brief dealing with the issue of whether a Writ of Habeas Corpus could be directed at Appellee by Appellant prior to induction be disregarded by the Court.

Counsel for Appellant in his argument, (Br. Appellant 16), states "it is now clearly settled law that actual induction into the Armed Forces of the United States is not required before Habeas Corpus will lie as the United States Supreme Court and this Court have pointed out time and time again." The true state of the law is exactly contrary to that stated by Appellant in that it is not clear at all whether Habeas Corpus will lie prior to actual induction into the Armed Forces of the United States. The case of *Estep v. United States*, 327 U. S. 114, was the first case in which it was determined that a person who refused to be inducted into the Armed Forces of the United States could raise the issue that he had been arbitrarily classified by his draft board. Prior to this time, the only method of judicially testing the validity

of a draft classification was by suing out a Writ of Habeas Corpus after induction. The Supreme Court in the *Estep* case, supra, of course, rightfully decided that as a defense in a criminal prosecution for refusing to be inducted into the Armed Forces of the United States, after he had exhausted his administrative remedies as outlined in *Falbo v. United States*, 320 U. S. 549, a defendant could show that he had been arbitrarily or capriciously classified by his Local Board and that the classification upon which the order to report for induction was based was void. Nowhere in the *Estep* case, supra, or in any of the other cases cited by the Appellant in his brief on page 16, is it ever suggested that Habeas Corpus would lie before induction into the Armed Forces. So far, the only two methods which have been judicially recognized by which a person may test the validity of his Selective Service classification are: (1) Habeas Corpus after induction into the Armed Forces, and (2) as a defense to a criminal prosecution for failure to submit to induction into the Armed Forces of the United States. See *Estep v. United States*, supra. In none of the cases cited by counsel for Appellant does it appear that the question of the availability of Habeas Corpus before induction into the Armed Forces was considered by the Court and nowhere is it intimated that such a procedure would be permissible. In fact, there are very strong reasons of policy in the administration of the Selective Service Act why it would not be wise to permit a person to sue out a Writ of Habeas Corpus to test the validity of his draft classification prior to induction into the Armed Forces. To permit the use of the Writ in this

manner would interfere unduly with the orderly processes of Selective Service.

Another reason why the Writ of Habeas Corpus was dissolved in the present case was that Captain Harris, as Commander of the Montana Induction Station was not the proper person to whom the Writ should be directed since he did not have custody of the Appellant. *Billings v. Truesdell*, 321 U. S. 542; *Jones v. Biddle*, 131 Fed. (2d) 853 Cert. den. 318 U. S. 784, see also Selective Service Regs., appendix. While Appellant has argued this point (Br. Appellant 17, 18, 19, 20), Specification of Error No. 8 does not adequately preserve this issue on appeal, hence, his contentions cannot be considered in this appeal. This argument, in addition to being unavailable to Appellant, is also untenable. Of course, it is true that in the *Billings* case and in the case of *Lawrence v. Yost* (CCA 9th) 157 Fed. (2d) 44, a Writ of Habeas Corpus prior to induction directed toward military officers lay, but it was only for the reason that the petitioners in those cases were actually and physically restrained of their liberty and held in detention by the military.

The distinction between Appellee's military role as an officer of the United States Armed Forces, and his civil role in the administration of Selective Service System, is one which is unfounded in reason and entirely lacking in authority. The case of *Billings v. Truesdell*, *supra*, cited by counsel for Appellant, is no authority for this proposition, and in fact holds exactly the opposite. In that case as previously mentioned, the petitioner was actually, unlawfully restrained of his liberty by force by members of the Armed Forces, who felt that he was

under their control, although not formally inducted into the Armed Forces of the United States. No case has been cited by Appellant and no case has been found in which a Writ of Habeas Corpus, directed at a military officer prior to induction, has lain, unless the officer actually and by force restrains the petitioner of his liberty. Such is not the case here as can be determined not only from the Record, but also from the petition for Writ of Habeas Corpus (R. 7, 8), and the testimony of Captain Harris, (R. 24, 25).

That such a distinction is untenable is borne out by the Selective Service Regulations, 1603.1-1603.8 (printed in appendix), and also by the testimony of Captain Harris, (R. 25), where he said:

"I asked Mr. Neibauer to remain in Butte overnight, he had every right to refuse, he could have refused without my being able to stop him. I asked him if he wouldn't stay over 24 hours, until we heard from this Writ, which he did. He was in touch with us all the time . . . I withheld any further action on inducting Mr. Neibauer until the Writ could be served, which was about six o'clock that evening. At that time, of course, Mr. O'Connell got in touch with Mr. Neibauer and took him away."

If the case of *Billings v. Truesdell* holds anything, it is that up until the actual moment of induction an inductee is subject to the orders of his Local Board, is under civil jurisdiction and is not subject to the military in any way. Appellant's own petition for Writ of Habeas Corpus clearly discloses that while he was at the Montana Induction Station in Butte, Montana, he was obeying the

orders of his Local Board and was not obeying any orders of Captain Harris or any representatives of the Armed Forces, except as required to do by order of his Local Board, (R. 7), see also Selective Service Regulations, 1632. 14 (a) 1632. 14 (b) 1632. 15 (e) printed in appendix. While the law might be considered unsettled on the proposition of whether or not a Writ of Habeas Corpus, properly directed, will lie before the inductee is actually taken into the Armed Forces, it would seem to be clearly settled as a result of the *Billings* case, that a Writ of Habeas Corpus prior to induction, will not lie against a member of the Armed Forces unless such member of the Armed Forces actually and physically restrained the petitioner of his liberty. Of course, if the petitioner is seeking to challenge the validity of his Selective Service classification prior to being inducted into the Armed Forces, the proper persons to charge as respondents are the members of his Local Board, since, as the *Billings* case makes clear, they are the persons who have custody of the petitioner prior to his actual induction into the Armed Forces of the United States. Furthermore, they are the logical ones to defend the validity of the order they issued. It cannot be too strongly urged that this is not a case similar to that of *Billings v. Truesdell*, but is merely one in which the Appellant has sought a judicial review of his classification prior to induction into the Armed Forces. The Record clearly discloses that the Appellant was at no time unlawfully restrained of his liberty by Appellee herein, (R. 7, 24, 25).

With reference to Appellant's specification of error No. 9, it is submitted that the earlier portions of this brief

show that the dissolution of the Writ of Habeas Corpus and the dismissal of the petition for Writ of Habeas Corpus was properly ordered by the Court.

CONCLUSION

This Appeal, properly, should present only two questions for the determination of the Court and those being the issues whether (1) under the circumstances here a Writ of Habeas Corpus will lie prior to induction and, if so, (2) whether or not the Commander of the Induction Station is the proper person to whom the Petition for Writ of Habeas Corpus and Writ of Habeas Corpus should be addressed. Although Appellant has not preserved the second issue for purposes of appeal, nevertheless, the lower Court's action was proper on this basis. Counsel for Appellant has seen fit to interject other issues which, because of his mis-statements of fact, attention to which is called supra, cause this Appeal to appear, on the surface, at least, to involve serious questions of due process of law and whether such has been denied to the Appellant herein. It is most strongly urged that the Appellant herein was given every opportunity to appear in Helena on June 19, 1951, and was accorded every respect and every consideration by the Appellee herein, (R. 24, 25), by counsel for Appellee, and by the Court, (R. 9, 10, 11, 25). However, despite the consideration shown Appellant by the Court, and by Appellee and his counsel, counsel for Appellant, for purposes known only to himself, attempted to delay action on the Writ once his client was temporarily relieved from duty of submitting to induction into the

Armed Forces. Appellant who relied on a stipulation which was filed without obtaining approval of the Court, when counsel for Appellant well knew the Court was opposed to any delay in the hearing of this matter, assumed the risk that the hearing would proceed as scheduled.

Upon the misrepresentations of counsel for Appellant, the Court issued a Writ of Habeas Corpus which directed that the petitioner appear before the Court on the 19th of June, 1951, (R. 9, 10). Counsel for Appellant informed the United States Attorney that he was obtaining such a Writ, and the United States Attorney cooperated with counsel for Appellant in making certain that Appellant would not be inducted prior to the hearing on the Writ of Habeas Corpus (R. 25), and Appellee himself cooperated in every way with counsel for Appellant by delaying the induction of Appellant for a period of approximately 24 hours in an effort to aid Appellant in his ill-conceived attempt to test the validity of his Selective Service classification, (R. 24, 25). Counsel for Appellant now would have this Court believe that counsel for Appellee, Appellee and the Court below all conspired to deprive Appellant of his Constitutional rights. The Record shows clearly that such is not the fact, that the error, if any there be, has been committed by counsel for Appellant as a result of his scheming and delaying tactics. It should be pointed out that the liberty of the Appellant has not been taken away from him, and was not taken away from him, by the action of the lower Court or by the actions of Appellee herein or his counsel. Appellant is free at the present time and is not a member of the

Armed Forces, (R. 25, 26). Appellant still has many remedies available to him to test the validity of his classification in the event that he is so disposed. The Court below merely held that the Appellant's petition for Writ of Habeas Corpus was not proper. This conclusion of law by the lower Court did not operate to deprive Appellant of his Constitutional rights or of his liberty. We respectfully submit that the Judgment and Order of the lower Court is proper in all respects and should be upheld by this Court.

Respectfully submitted,

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APPENDIX

United States Code, Title 28.

Section 2243. Issuance of writ; return; hearing; decision.

A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto.

The writ, or order to show cause shall be directed to the person having custody of the person detained. It shall be returned within three days unless for good cause additional time, not exceeding twenty days, is allowed.

The person to whom the writ or order is directed shall make a return certifying the true cause of the detention.

When the writ or order is returned, a day shall be set for hearing, not more than five days after the return unless for good cause additional time is allowed.

Unless the application for the writ and the return present only issues of law, the person to whom the writ is directed shall be required to produce at the hearing the body of the person detained.

The applicant or the person detained may, under oath, deny any of the facts set forth in the return or allege any other material facts.

The return and all suggestions made against it may be amended, by leave of court, before or after being filed.

The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require. June 25, 1948, c. 646, 62 Stat. 965.

Selective Service Regulations.

Part 1603—Selective Service Personnel in General.

1603.1 Citizenship.—No person shall be appointed to any position, either compensated or uncompensated, in the Selective Service System, who is not a citizen of the United States.

1603.2 Voluntary Services.—Voluntary services in the administration of the selective service law may be accepted and should be encouraged.

1603.3 Uncompensated Services.—The services of registrars (except as the Director of Selective Service may otherwise provide), members of local boards, members of appeal boards, government appeal agents and associate government appeal agents, medical advisers to the local boards, medical advisers to the State Directors of Selective Service, advisers to registrants, interpreters, and all other persons volunteering their services to assist in the administration of the selective service law, shall be uncompensated, and no such person serving without compensation shall accept

remuneration, from any source, for services rendered in connection with selective service matters.

1603.4 Oath of Office and Other Forms.—(a) Every person who undertakes to render voluntary uncompensated service in the administration of the selective service law shall, before he enters upon his duties, execute an Oath of Office and Waiver of Pay (SSS Form No. 400).

(b) Every person who undertakes to render compensated service in the administration of the selective service law shall execute an oath of office in the form prescribed by the United States Civil Service Commission, Standard Form No. 61.

(c) Compensated and uncompensated personnel appointed for duty in the Selective Service System shall execute such other forms as are required by law. Executive order of the President, the regulations of the United States Civil Service Commission, or the Director of Selective Service.

(d) When executed in the manner hereinbefore provided, the Oath of Office and Waiver of Pay (SSS Form No. 400) and such other forms as may be required shall be filed in accordance with instructions issued by the Director of Selective Service.

1603.5 Termination of Appointment.—The appointment of any deputy, officer, agent, employee, or other person engaged in the administration of the selective service law, whether with or without compensation, may be

terminated by resignation, death, or removal, or, in appropriate cases, by transfer or retirement.

1603.6 Removal.—(a) Any person, other than a compensated civilian officer or employee, engaged in the administration of the selective service law may be removed by the Director of Selective Service. The Governor may recommend to the Director of Selective Service the removal, for cause, of any person engaged in the administration of the selective service law in his State. The Director of Selective Service shall make such investigation of the Governor's recommendation as he deems necessary, and upon completion thereof shall take such action thereon as he deems proper.

(b) Any compensated civilian officer or employee engaged in the administration of the selective service law may be removed in accordance with the rules and regulations of the United States Civil Service Commission.

1603.7 Suspension.—The Director of Selective Service may suspend any deputy, officer, agent, employee, or other person engaged in the administration of the selective service law, pending his consideration of the advisability of removing any such person. Suspensions of persons entitled to veterans' preference under the Veterans' Preference Act of 1944, as amended, shall be in accordance with the regulations prescribed by the United States Civil Service Commission pursuant to that Act. During the period that any such person is

suspended, he shall be disqualified to act in his official capacity.

1603.8 Vacancies.—Vacancies may be filled in accordance with instructions issued by the Director of Selective Service.

INDUCTION

1632.14 Duty of Registrant to Report for and Submit to Induction.—(a) When the local board mails to a registrant an Order to Report for Induction (SSS Form No. 252), it shall be the duty of the registrant to report for induction at the time and place fixed in such order. If the time when the registrant is ordered to report for induction is postponed, it shall be the continuing duty of the registrant to report for induction upon the termination of such postponement and he shall report for induction at such time and place as may be fixed by the local board. Regardless of the time when or the circumstances under which a registrant fails to report for induction when it is his duty to do so, it shall thereafter be his continuing duty from day to day to report for induction to his local board and to each local board whose area he enters or in whose area he remains.

(b) Upon reporting for induction, it shall be the duty of the registrant (1) to follow the instructions of a member or clerk of the local board as to the manner in which he shall be transported to the location where

his induction will be accomplished, (2) to obey the instructions of the leader or assistant leaders appointed for the group being forwarded for induction, (3) to appear at the place where his induction will be accomplished, (4) to obey the orders of the representatives of the armed forces while at the place where his induction will be accomplished, (5) to submit to induction, and (6) if he is not accepted by the armed forces, to follow the instructions of the representatives of the armed forces as to the manner in which he will be transported on his return trip to the local board.

1632.15 Forwarding Registrants for Induction.—(e) The local board shall inform all registrants in the group that it is their duty to obey the instructions of the leader or assistant leaders during the time they are going to the place of induction; that they will be met by proper representatives of the armed forces at the place of induction; that while they are at the place of induction they will be subject to and must obey the orders of the representatives of the armed forces; that they must present themselves for and submit to induction; that, if they are rejected, the representatives of the armed forces will, to the extent prescribed by the regulations of the armed forces, provide transportation and subsistence for their return trip.

No. 13043

IN THE
United States
Court of Appeals
for the Ninth Circuit

CHARLES R. NEIBAUER,

Appellant,

vs.

CAPTAIN MAX R. HARRIS, Commanding Officer,
Montana Induction Center, Butte, Montana,

Appellee.

APPELLANT'S REPLY BRIEF

APPEAL FROM THE UNITED STATES
DISTRICT COURT, FOR THE
DISTRICT OF MONTANA

Filed, 1952

Clerk



FILED

FEB 15 1952

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APPELLANT'S REPLY BRIEF

It is most unfortunate that Appellee's Brief, in more than one-half of its entire contents, is devoted to an unwarranted personal attack upon counsel for the Appellant. It seems apparent that counsel for the Appellee seeks to becloud the real issues and the merits of this appeal, and the justice which Appellant seeks, behind a smokescreen of intemperate vituperation. Appellant is sure that this Court will not be deceived by this shaggy bearded device of "trying the

Attorney for the other side,” and resorting to the time-worn and oft denounced **argumentum ad hominem**. It is unfortunate, too, that so much of Appellee’s Brief is de hors the record, and based upon his Counsel’s testimony of oral conversations held between the lower Court and Appellant’s counsel, when the recollection and the understanding of such conversations are subject to the human frailty of faulty memory on both sides.

For the record, Counsel for the Appellant has a different recollection and understanding of the conferences which were held with the lower Court, but is more than willing to concede that in his inexperience he may have misunderstood the lower Court’s suggestions, but such misunderstanding, if any was not “fraudulent,” “scheming,” “fraud and trick,” or “misrepresentation, so glibly hurled in Appellee’s brief.

Appellant submits that this appeal and this forum is not the proper place or time for Counsel for the Appellee to make the unwarranted personal attack to which they stoop to achieve a victory. Certainly their outcry comes too late. Why didn’t counsel for the Appellee raise this issue at the time of the hearing in the lower Court, when not a single word was said? (R. 22, 23, 24, 25, 26.) Why wasn’t it raised on the Motion to Quash the Stay of Execution, which was not even set down for hearing? Why wasn’t it raised in Appellee’s Motion to Dismiss this appeal, which motion this Court properly denied? Why wasn’t it

raised in a Motion to correct the record at any time in the several months since the record was designated on appeal? Why wasn't the matter raised by calling in Counsel for the Appellant in the lower Court, and dealing with it properly and at the proper time and in the proper place, instead of denying to Appellant his rights under the law of the land? Why now does Counsel seek to compound injustice, instead of permitting this Court to pass upon the real issues and the merits of this appeal? Why penalize Appellant further for fancied grievances concerning his Counsel?

Counsel for the Appellant is sure that this Court will not waste its precious time over petty personalities, but will decide the appeal on the merits of the case, and render justice to the Appellant, which has heretofore been denied. Appellant will not belabor the Court further, but on the law in the case, will rely upon his opening brief and his oral argument on the appeal before this court.

Respectfully submitted,

JERRY J. O'CONNELL,
Attorney for the Appellant
305 Barber-Lydiard Bldg.
Great Falls, Montana

No. 13,043

IN THE
United States
Court of Appeals
for the Ninth Circuit

CHARLES R. NEIBAUER,

Appellant,

vs.

CAPTAIN MAX R. HARRIS, Commanding Officer,
Montana Induction Center, Butte, Montana,

Appellee.

APPEAL FROM THE UNITED STATES
DISTRICT COURT, FOR THE
DISTRICT OF MONTANA

PETITION FOR REHEARING

Filed, 1952

FILE Clerk



JUN 13 1952

PAUL B. CARR

IN THE
United States
Court of Appeals
for the Ninth Circuit

CHARLES R. NEIBAUER,

Appellant,

vs.

CAPTAIN MAX R. HARRIS, Commanding Officer,
Montana Induction Center, Butte, Montana,

Appellee.

APPEAL FROM THE UNITED STATES
DISTRICT COURT, FOR THE
DISTRICT OF MONTANA

PETITION FOR REHEARING

The appellant above named respectfully petitions this Honorable Court for a rehearing of the appeal in the above-entitled cause, and in support of this petition represents to the court as follows:

We reserve our argued position as to each of the points of appeal, but in this petition address ourselves

solely to that feature of the decision wherein we believe the court may be convinced its result is based upon the application of incorrect legal principles.

Therefore this petition is devoted to convincing this court that it erred in its determination that “Actually, if appellant was ever in custody he was released on June 15, 1951, before the writ was served” (emphasis supplied). This finding and opinion ignore the whole question of hearing and due process raised by the appellant in the first four specifications of his opening brief, which are the specifications which actually go to the heart of the case and which were so ably and cogently pointed out by Judge Mathews on the oral argument of the case. The court’s opinion actually accepts the statements of the appellee and his attorney in the abortive hearing allegedly held by the lower court. The only way that this court could find that the appellant was released before the writ was served is to accept the appellee’s testimony that the former was released, which statements were made in what was no more than an oral discussion held between the lower court and the appellee in the absence of the appellant and his counsel and in violation of the appellee’s duty to produce the body of the appellant as ordered by the writ which issued, or at least to show that the appellant was not in his custody. Appellee has not made any return to the appellant’s petition and the allegations of restraint and custody therein set forth are still to this day uncontroverted and undenied as Judge Mathews

pointed out in the oral argument. The only way it can be determined, under due process and the provisions of the statute, whether the appellant was released before the writ was served is to send this case back for proper hearing, under the law, by the lower court. With respect to this court's opinion that the appellant is not now in custody and has not been in custody since June 15, 1951, is to again accept the statements made in the purported hearing held by the lower court and to ignore the record which shows that the appellant is not now in custody only by virtue of his release on his recognizance by District Judge Charles N. Pray. Appellant feels that the court clearly erred in failing to send this case back for proper hearing before the lower court.

For the foregoing reasons this Petition for Rehearing should be granted.

Respectfully submitted,

JERRY J. G'CONNELL,
Attorney for the Appellant

CERTIFICATE OF COUNSEL

STATE OF MONTANA, }
COUNTY OF CASCADE }^{ss.}

JERRY J. O'CONNELL, being first duly sworn,
on oath certifies and says:

That he is the attorney for the appellant in this
cause; that he makes this certificate in compliance
with Rule 25 of the rules of this court; that in his
judgment the within and foregoing Petition for Re-
hearing is well founded and is not interposed for
delay.

JERRY J. O'CONNELL,

Subscribed and sworn to before me at Great Falls,
Montana, this 10th day of June, 1952.

VIOLA A. ANDERSON

Notary Public in and for the
State of Montana

Residing at Great Falls, Montana

My Commission Expires Oct. 19, 1954



